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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FAYUS ENTERPRISES, on behalf of itself and all others similarly situated, et al.,

Petitioners,

—v.—

BNSF RAILWAY COMPANY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners have alleged that Respondents conspired to raise prices in violation of federal and state laws. In the ICC Termination Act of 1995, Congress enacted (i) a limited express preemption clause stating that the remedies "with respect to regulation of rail transportation" provided by "this part" (49 U.S.C. § 10101 et seq.) are exclusive and "preempt the remedies provided under Federal and State law" (App. 64a, 49 U.S.C. § 10501(b)), and (ii) a statutory policy of the United States Government "to allow . . . competition and the demand for services to establish reasonable rates for transportation by rail," and "to ensure . . . a sound rail transportation system with effective competition . . ." (App. 62a, 49 U.S.C. § 10101(1) & (4)).

The question presented by this petition is:

Are state laws of general application not directed at rail transportation, which provide compensation to victims of unlawful price-fixing, properly preempted under a court's "purposes and objectives" analysis that does not consider (a) the plain wording of the express preemption clause (as other circuits have done), (b) the pro-competitive U.S. Government policy enacted by Congress, or (c) the statutory exception in the preemption clause for "[e]xcept as otherwise provided in this part," which elsewhere authorizes private transportation contracts that "shall not be subject to this part" (App. 69a, 49 U.S.C. § 10709(c)(1)).

PARTIES AND CORPORATE DISCLOSURE

Pursuant to Rule 14(1)(b), Fayus Enterprises, Agway Liquidating Trust, and Maroon Incorporated ("Petitioners") state:

A. List of Parties.

The parties now before the Court and before the United States Court of Appeals for the District of Columbia Circuit are as follows:

1. Petitioners:
   a. Fayus Enterprises;
   b. Agway Liquidating Trust; and
   c. Maroon Incorporated.
2. Respondents:
   a. BNSF Railway Company, Inc.;
   b. CSX Transportation, Inc.;
   c. Norfolk Southern Railway Company; and
   d. Union Pacific Railroad Company.
3. Amici: None known at time of filing.

B. Corporate Disclosure Statement.

Pursuant to Rule 29.6, Petitioners state:

Petitioner Fayus Enterprises is a California corporation with its principal place of business at 1720 N. Market Boulevard, Suite 11, Sacramento, California 95834.

Petitioner Agway Liquidating Trust is a liquidating trust established by an order of the United

States Bankruptcy Court for the Northern District of New York dated April 28, 2004. Its offices are c/o D. Clark Ogle, 308 Maltbie Street, Suite 100, Syracuse, New York 13204-1498.

Petitioner Maroon Incorporated is an Ohio corporation with its principal office at 1390 Jaycox Road, Avon, Ohio 44011.

There is no parent or publicly held company owning 10% or more of the stock of any petitioner.

TABLE OF CONTENTS

Page

Question Presented i
Parties and Corporate Disclosure ii
A. List of Parties ii
B. Corporate Disclosure Statement ii
Table of Contents iv
Table of Authorities vii
Opinions and Orders 1
Jurisdiction 1
Constitutional Provisions and Statutes 2
Statement of the Case 3
A. Basis for Federal Jurisdiction 4
B. Statutory Structure 4
C. Price-fixing Allegations Material to Questions Presented 7
D. Decisions of the District Court 9
E. Decisions of the Court of Appeals 10
Reasons For Granting The Petition 13
A. The Court of Appeals' Purposes and Objectives Analysis Broadened an Express Preemption Clause Beyond What Congress Enacted 15
B. The Court of Appeals' Expansive Definition of "Regulation" is Without Statutory Basis and Conflicts with Other Circuits 23
C. The Court of Appeals Failed to Apply the Presumption Against Preemption 30
Conclusion 37

APPENDIX

Opinions & Orders of the United States Court of Appeals for the District of Columbia Circuit

Opinion affirming judgment of the District Court, reported as *Fayus Enterprises, on behalf of itself and all others similarly situated, et al., v. BNSF R. Co., et al.* 602 F.3d 444 (D.C. Cir. April 16, 2010) ..... App. 1a

Judgment (April 16, 2010) and Mandate (by endorsement on judgment, June 25, 2010), *Fayus Enterprises, on behalf of itself and all others similarly situated, et al., v. BNSF R. Co., et al.* (unreported) (D.C. Cir. 2010) ..... App. 25a

Order denying Petition for Panel Rehearing (unreported) (D.C. Cir. June 8, 2010) ..... App. 27a

Order denying Petition for Rehearing En Banc (unreported) (D.C. Cir. June 8, 2010) ..... App. 28a

Opinions & Orders of the United States District Court for the District of Columbia

Opinion granting in part and denying in part Respondents' Motion to Dismiss, reported as *In re Rail Freight Fuel Surcharge Antitrust Litigation,* 593 F.Supp.2d 29 (D.D.C. Dec. 31, 2008) .. App. 29a

Order granting in part and denying in part Respondents' Motion to Dismiss and dismissing Petitioners' state law claims (unreported) (D.D.C. Dec. 31, 2008) ..... App. 58a

Order entering final judgment on Petitioners' state law claims pursuant to Fed. R. Civ. P. 54(b) (unreported) (D.D.C. Jan. 16, 2009) ..... App. 60a

Constitutional Provisions and Statutes ..... App. 62a

United States Constitution, Art. VI, Cl. 2 ..... App.62a

Title 49, United States Code: Transportation. Subtitle IV: Interstate Transportation. Part A: Rail

§ 10101(1) & (4) ..... App. 62a

§ 10102(5) & (9) ..... App. 63a

§ 10501(b) ..... App. 64a

§ 10706(a)(2) & (3) ..... App. 64a

§ 10709(a), (b) & (c) ..... App. 69a

Petitioners' Consolidated Amended Complaint, April 15, 2008 ..... App. 70a

TABLE OF AUTHORITIES

PAGE

CASES

49 U.S.C. § 10101 ..... passim

Altria Group v. Good, __, U.S. __, 129 S.Ct. 538 (2008) 15, 33

Bates v. Dow Agrosciences, 544 U.S. 431 (2005) 34

Bell Atlantic v. Twombly, 550 U.S. 544 (2007) 9

Bldg. & Con. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993) 34

Burlington Northern R. Co. v. I.C.C., 679 F.2d 934 (D.C. Cir. 1982). 6

City of Boerne v. Flores, 521 U.S. 507 (1997) 34

CSX Transp. v. Easterwood, 507 U.S. 658 (1993) 16, 22

Erickson v. Pardus, 551 U.S. 89 (2007) 7

Fayus Enterprises, et al., v. BNSF R. Co., et al., 602 F.3d 444 (D.C. Cir. Apr. 16, 2010) ...passim

Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001) .....passim

Franks Invsmt. Co. v. Union Pac. R. Co., 593 F.3d 404 (5th Cir. *en banc*, Jan. 10, 2010) .....passim

G. & T. Terminal Packaging v. Consolidated Rail, 830 F.2d 1230 (3d Cir. 1987) 19

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) 34

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)..... 33

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 14, 16, 17

Gendron v. Chicago & N.W. Transp. Co., 564 N.E.2d 1207 (Ill. 1990) 19

Gregory v. Ashcroft, 501 U.S. 452 (1992) 33

In re Rail Freight Fuel Surcharge Antitrust Litigation 587 F.Supp.2d 27 (D.D.C. 2008)..... 9

In re Rail Freight Fuel Surcharge Antitrust Litigation, 593 F.Supp.2d 29 (D.D.C. Dec. 31, 2008)..... v, 1

Medtronic v. Lohr, 518 U.S. 470 (1996)..... 15, 34

Mintz v. Baldwin, 289 U.S. 346 (1933) 31

People v. Conrail, 613 N.E.2d 784 (Ill. App. 1993)..... 19

Rice v. Santa Fe Elevator, 331 U.S. 218 (1947) 31

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 16

United States v. Gonzales, 520 U.S. 1 (1997)..... 13

Wyeth v. Levine, __ U.S. __ 129 S.Ct. 1187 (2009) 22, 31

STATUTES

15 U.S.C. § 15..... 4

15 U.S.C. § 26..... 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332(d) 4

49 U.S.C. § 10102(5) ..... vi, 2

49 U.S.C. § 10102(9) 2, 6, 11, 20

49 U.S.C. § 10103 (pre-1995) 17, 18

49 U.S.C. § 10501(a) 5

49 U.S.C. § 10501(b) ..... passim

49 U.S.C. § 10501(d) (pre-1995) 17, 18, 19

49 U.S.C. § 10704 6

49 U.S.C. § 10709(c) ..... i, 5, 6, 19

49 U.S.C. § 10713 (pre-1995) 5

49 U.S.C. §§ 701-27 ..... 5, 6

ICC Termination Act of 1995, P.L. 104-88, 109 Stat. 803 ..... passim

Staggers Rail Act of 1980, P.L. 94-448, 94 Stat. 1895 ..... 4, 6, 11

CONGRESSIONAL DOCUMENTS

Committee on Transportation and Infrastructure, House of Representatives, ICC Termination Act of 1995, H.R. Rep. 104-311 (Nov. 6, 1995) reprinted in 1995 U.S.C.C.A.N. 793 ..... 11, 17, 18, 19

House-Senate Committee of Conference, ICC Termination Act of 1995, H.R. Rep. 104-422 (Dec. 18, 1995) reprinted in 1995 U.S.C.C.A.N. 850 ..... 11, 20, 21, 23

House-Senate Committee of Conference, Staggers Rail Act of 1980, H.R. Conf. Rep. 96-1430 (Sept. 29, 1980), reprinted in 1980 U.S.C.C.A.N. 4110 12

Senate Commerce, Science & Transportation Committee, Staggers Rail Act of 1980, S. Rep. 96-470 (Dec. 7, 1979) 12

TREATISES AND LAW REVIEWS

Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000) 15, 29, 30

Carter H. Strickland, Jr., Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations, 34 Ecology L.Q. 1147 (2007) 32

Ernest R. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1 (2004) 32

Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 Neb. L. Rev. 912 (2007) 16

Lawrence Tribe, American Constitutional Law (2d ed. 1988) 33

Maureen E. Eldridge, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549 (2004) 4

Stephen A. Gardbaum, *The Nature of Preemption*, 76 Cornell L. Rev. 767 (1994) 30, 31

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS

The opinion of the United States District Court for the District of Columbia granting in part and denying in part Respondents' Motion to Dismiss is reported as *Fuel Surcharge Antitrust Litigation*, 593 F.Supp.2d 29 (D.D.C. 2008) (App. 29a). The order dismissing Petitioners' state law claims is unreported (App. 58a). The order entering final judgment on Petitioners' state law claims pursuant to Fed. R. Civ. P. 54(b) is unreported (App. 60a).

The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the District Court is reported as *Fayus Enterprises, et al., v. BNSF R. Co., et al.*, 602 F.3d 444 (D.C. Cir. Apr. 16, 2010) (App. 1a). The court's judgment (April 16, 2010) and Mandate (by endorsement, June 25, 2010) are unreported (App. 25a). The court's June 8, 2010 orders denying plaintiffs' petitions for panel rehearing (App. 27a) and for rehearing *en banc* (App. 28a) are unreported.

JURISDICTION

Rule 13.3 provides that the 90-day period for filing a petition for certiorari runs from June 8, 2010, the date of entry by the court of appeals of orders denying Petitioners' petitions for panel rehearing and rehearing en banc (App. 27a & 28a). This petition has been filed under Rule 29 within such 90-day period. This Court has jurisdiction to review the deci-

sion of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Following are the Constitutional provisions and statutes involved in the case, which are set forth in the Appendix to this Petition pursuant to Rule 14.1(f) and (i).

- United States Constitution, Art. VI, Cl. 2 (App. 62a).
- United States Code, Title 49: Transportation.
  Subtitle IV: Interstate Transportation.
  Part A: Rail.

  § 10101(1) & (4) (App. 62a).

  § 10102(5) & (9) (App. 63a).

  § 10501(b) (App. 64a).

  § 10706(a)(2) & (3) (App. 64a).

  § 10709(a), (b) & (c) (App. 69a).

STATEMENT OF THE CASE

This court has repeatedly held that, in construing the scope of an express preemption clause, courts must focus on the plain wording of the clause. The preemption clause at issue here, 49 U.S.C. § 10501(b), has been construed by other circuits in accordance with its plain wording. The court of appeals below used various legislative reports to develop its own "purposes and objectives" analysis that, if not limited by this Court, will result in widespread preemption of state laws of general application where the statute at issue contains no indication that this was Congress's intent. As other circuits have found, the plain wording of the clause indicates Congress intended to preempt only remedies with respect to *regulation* of rail transportation.

Respondents are four railroads who collectively operate more than 90 percent of all rail tracks in the United States. Petitioners, indirect purchasers of rail transportation services pursuant to private, non-tariff shipping contracts under 49 U.S.C. § 10709, allege that Respondents entered into unlawful price-fixing agreements and seek injunctive relief under federal and state antitrust law and damages under state antitrust and deceptive trade practice statutes and the common law of unjust enrichment. App. 71a & 90a (Complaint ¶¶ 1, 47). The district court denied Respondents' motion to dismiss Petitioners' federal law claims, but found Petitioners state law claims preempted. App. 29a & 58a. On appeal of the dismissal of the state law claims, the court of appeals construed the express preemption clause in 49 U.S.C. § 10501(b), in light of what it found to be Congress's

"purposes and objectives," as preempting all of Petitioners' state law claims.

The court of appeals effectively applied an implied preemption, purposes and objectives analysis to a narrow express preemption clause. The case presents this Court with an opportunity to emphasize to lower courts the importance of construing, and recognizing the limits imposed by, the specific language of an express preemption statute. A writ of certiorari should be issued.

A. Basis for Federal Jurisdiction

Federal jurisdiction over this action is founded on 15 U.S.C. §§ 15 & 26. Federal jurisdiction is also founded on 28 U.S.C. §§ 1332(d)(2) & (6) because one or more members of the putative class are citizens of a state different from one or more defendants and the aggregate amount in controversy exceeds five million dollars ($5,000,000), exclusive of interests and costs.

B. Statutory Structure

In 1980 Congress enacted the Staggers Rail Act of 1980, P.L. 94-448, 94 Stat. 1895, ending an era of almost 100 years during which railroads generally charged shippers only published tariff rates filed with the ICC.[1] The Staggers Act substantially deregulated the railroads and for the first time authorized railroads to enter into private contracts to

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[1] *See* Maureen E. Eldridge, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549, 557-58 (2004) (summarizing regulation under the ICC and factors leading to deregulation).

provide rail transportation, with contract-set rates rather than regulated rates. 49 U.S.C. § 10713 (pre-1995), now codified as amended at 49 U.S.C. § 10709(c)(1).

In 1995 Congress enacted the ICC Termination Act of 1995, P.L. 104-88, 109 Stat. 803, which abolished the Interstate Commerce Commission ("ICC"), and created the Surface Transportation Board ("STB") within the Department of Transportation to assume what remained of the ICC's responsibilities (49 U.S.C. §§ 701-27). This appeal involves the portion of the Termination Act applicable to railroads, 49 U.S.C. §§ 10101 to 11908 ("this part" or the "Rail Part"). The Rail Part gave railroads greater freedom to price their services, and encouraged greater reliance on competition to set rates.

The preemption clause at issue is found in 49 U.S.C. § 10501(b). The jurisdiction of STB is defined generally at 49 U.S.C. § 10501(a). The first sentence of 49 U.S.C. § 10501(b), which the court of appeals referred to as the "exclusive jurisdiction clause" (App. 5a, 602 F.3d at 446), grants to the STB exclusive jurisdiction over delimited areas: (i) "transportation by rail carriers," (ii) the remedies provided by the Rail Part with respect to rates, rules and practices of rail carriers, and (iii) track construction and abandonment. App. 64a.

The second sentence of 49 U.S.C. § 10501(b), which the court called the "exclusive remedies clause" (App. 5a, 602 F.3d at 446), makes preemptive the remedies provided by the Rail Part "with respect to regulation of rail transportation," a phrase added

to the exclusive remedies clause to limit the scope of preemption. See Part **B** under Reasons for Granting the Petition. The exclusive remedies clause reads:

> Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (App. 64a).

The word "transportation" is defined at 49 U.S.C. § 10102(9) (App. 63a) as facilities or equipment "related to the movement of passengers or property, or both, by rail . . ., [and] services related to that movement." App. 63a. The term "regulation," as used in the phrase "regulation of rail transportation," is not defined in the statute.

Chapter 107 of the Rail Part deals with the rate-making process. What remains of rate regulation after the ICC Termination Act is now performed by the STB. *See* 49 U.S.C. §§ 701-27 & 10704. The Act continued the deregulatory approach adopted initially in the Staggers Rail Act, under which railroads and their freight shipping customers were permitted to enter into private contracts that are not subject to rate review by the STB. 49 U.S.C. § 10709(c)(2), App. 69a.[2] Today, 80 percent or more of all rail shipments move under these unregulated private trans-

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[2] As then Judge Ginsburg wrote: "Prior to enactment of the Staggers Act, the legality of a rate agreement between shipper and carrier was less than crystal clear." *Burlington Northern R. Co. v. I.C.C.*, 679 F.2d 934, 936 (D.C. Cir. 1982).

portation contracts. App. 34a (593 F.Supp.2d at 34); App. 94a (Complaint, ¶ 56). Petitioners' purchases of rail transportation services were pursuant to these private contracts.

Section 10101 states that "the policy of the United States Government" regarding rail regulation is to allow competition to set rates, and to ensure effective competition among railroads and with other modes of transportation. 49 U.S.C. § 10101(1) & (4) (App. 62a).

C. Price-fixing Allegations Material to Questions Presented

Petitioners' complaint alleges the following facts, to be taken as true with inferences in Petitioners' favor on review of a dismissal on the pleadings. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). The district court summary of these facts appears at App. 34a-37a, 593 F.Supp.2d at 34-35.

In 2003, the four defendants, who controlled approximately 90 percent of rail freight traffic in the United States, sought to increase revenues through the use of fuel surcharges. App. 80a & 89a (Complaint ¶¶ 23, 43). For deregulated rail transportation Respondents could no longer obtain an across-the-board percentage increase of their rates from the ICC. App. 96a (Complaint ¶ 60). Recognizing the time and costs involved in renegotiating rates individually with and possibly losing their private shipping contract customers, Respondents elected to impose a percentage-based "rail fuel surcharge" to achieve an across-the-board rate increase on unregulated traffic. *Id.*

A barrier Respondents faced was that the private transportation contracts under which most rail freight was transported already had rate-escalation provisions for increases in fuel costs, based on an All Inclusive Index (the "AII") published by the Association of American Railroads (the "AAR"). App. 72a, 96a & 100a (Complaint ¶¶ 3, 61 & 70). Respondents agreed among themselves to resolve this issue by using the AAR, which they dominate and control, to create a new index that did not include fuel costs, which would allow the Respondents to impose a new, percentage-based, stand-alone fuel surcharge in a coordinated fashion across their customer base. App. 75a-77a, 96a-98a, 100a-101a (Complaint ¶¶ 10-17, 60-65, 70-72). The agreement to remove fuel from the AII and RCAF took place in the fall of 2003, when the AAR, at Respondents' behest, published the new index, the All Inclusive Index Less Fuel (the "AII-LF").

After removing fuel from the then-prevailing cost escalation indexes, the Railroads began to assess stand-alone fuel surcharges on a widespread basis and in a coordinated manner. App. 76a-78a, 101a-03a, 105a (Complaint ¶¶ 14, 16, 18, 73, 75, 81). Respondents applied broadly across various private transportation contracts a fuel surcharge percentage to the entire freight rate, notwithstanding that fuel only accounts for a portion of the costs of the shipment. *Id.* Through collective action, Respondents used the stand-alone fuel surcharge as a way to increase revenue beyond the real increased cost of fuel, not simply capture increases in fuel costs. App. 105a-06a, 112a (Complaint 81-83, 91). *Id.*

Respondents agreed among themselves not to negotiate discounts on their fuel surcharges and overall contract rates, even though prior to mid-2003 the custom had been for railroads to do so. App. 114a, 116a, 117a (Complaint ¶¶ 94, 98, 101). They also agreed among themselves not to undercut each other's pricing or to take market share from each other. App. 78a, 105a, 117a (Complaint ¶¶ 20, 81, 101). As a consequence, Respondents' respective market shares remained stable throughout the period of the conspiracy. App. 117a (Complaint ¶ 101).

D. Decisions of the District Court

Eighteen class action lawsuits alleging that the railroads' conduct violated the antitrust laws were consolidated by the Multidistrict Litigation Panel and transferred to the district court. Two putative classes were created for purchasers of rail services pursuant to private transportation contracts, one for direct purchasers and one for indirect purchasers. App. 30a, 593 F.Supp.2d at 32. Regarding the direct purchasers complaint, the district court denied Respondents' motion to dismiss, holding that the direct purchasers had satisfied the pleading standards under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), App. 38a, 593 F.Supp.2d 35-36; see *In re Rail Freight Fuel Surcharge Antitrust Litigation* 587 F.Supp.2d 27, 32-34 (D.D.C. 2008) (denial of motion to dismiss claims of direct purchasers).

Regarding the indirect purchasers' complaint, the district court sustained the pleading of both the federal and state antitrust claims as sufficient under *Twombly*, finding that Petitioners' complaint identi-

fies Respondents' supra-competitive prices and alleges an injury to competition that "is precisely that sort of injury that the antitrust laws are intended to protect against." App. 38a-39a, 52a, 593 F.Supp.2d at 35-36, 41-42. The court sustained Petitioners' pleading of standing, injury and causation, and upheld Petitioners claims for injunctive relief under the federal antitrust laws. App. 38a, 50a-57a, 593 F.Supp.2d at 35, 41-43. No appeal was taken challenging these rulings.

The court determined, however, that 49 U.S.C. § 10501(b) manifested "Congress's intent to preempt state regulatory authority over railroad operations," and dismissed Petitioners' state law claims as preempted. App. 40a-41a, 593 F.Supp.2d at 36-37. On Petitioners' unopposed motion, the district court entered final judgment on their state law claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App. 60a. A timely appeal to the court of appeals followed. Proceedings on petitioners' federal law claim were stayed pending the appeal. App. 60a.

E. Decisions of the Court of Appeals

The court of appeals affirmed the dismissal of Petitioners' state law claims, finding that the state antitrust, deceptive trade practice and unjust enrichment laws at issue were preempted by 49 U.S.C. § 10501(b). The court reached this conclusion, however, not by construing the plain wording of the express preemption clause, which would have required the conclusion that the preempted laws provided "remedies with respect to regulation of rail transportation," or by referring to the statutory defi-

nition of "transportation" (49 U.S.C. § 10102(9)), or even by drawing on the case law construing the term "regulation." Rather, the court found implied in statute and the case law that these state laws were preempted because they related to the "relationship of shippers and carriers," which constituted "economic regulation" within "the core of ICCTA preemption." App. 16a-17a, 602 F.3d at 451. The court of appeals identified no statutory source for these terms.

Disregarding the narrow and specific language of 49 U.S.C. § 10501(b), the court concluded that "Congress sought to avert the sort of *frustration of its deregulatory purpose* potentially inflicted by state rights and remedies . . . ," and that application of "plaintiffs' state law claims would directly *interfere with the ICCTA's deregulatory objectives.*" App. 19a & 20a, 603 F.3d at 452 (emphasis added). The court based this conclusion not on the preemption language Congress enacted, but on selected quotations from various reports of Congressional committees over a period of fifteen years, only one of which addressed the full preemption clause.[3]

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[3] The court cited here (App. 18a) Committee on Transportation and Infrastructure, House of Representatives, ICC Termination Act of 1995, H.R. Rep. 104-311 (Nov. 6, 1995), reprinted in 1995 U.S.C.C.A.N. 793 **(the "House Report")**, and House-Senate Committee of Conference, ICC Termination Act of 1995, H.R Rep. 104-422 (Dec. 18, 1995), reprinted in 1995 U.S.C C.A.N. 850 **(the "Conf. Report")**, the Conference Committee report that accompanied the final bill enacted by Congress. The third and fourth reports the court cited were Congressional committee reports from 15 years earlier, prepared in connection with the Staggers Act of 1980. App. 18a, citing House-Senate

The central issue presented by this appeal is the proper application of the exclusive remedies clause added to 49 U.S.C.§ 10501(b) in 1995, and particularly a limiting phrase Congress added in the last draft bill that only remedies "with respect to regulation of rail transportation" would have preemptive effect. What is notable about the court of appeals' analysis of Congress's purposes and objectives is its reliance on these four legislative reports rather than the plain wording of the preemption clause enacted by Congress. App. 18a & n.4, 602 F.3d at 451-52.

Of the four reports, two were from 1980, fifteen years before the exclusive remedies clause was proposed. The third was the initial House Report for the ICC Termination Act, and the passage cited by the court addressed the exclusive jurisdiction clause *before the exclusive remedies clause was added to it*.

Only the fourth report, the Conference Report that accompanied the last draft bill, refers to the exclusive remedies clause as actually enacted, *i.e.*, with the limiting phrase "with respect to regulation of rail transportation." This fourth report explains that the limiting phrase was added to "clarify[ ] that the exclusivity is limited to remedies with respect to rail regulation - not State and Federal law generally" (Conf. Report at 167). Rather than acknowledge this explanation, however, the court of appeals cited the

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Committee of Conference, Staggers Rail Act of 1980, H.R. Conf. Rep. 96-1430 (Sept. 29, 1980), reprinted in 1980 U.S.C.C.A.N. 4110, and Senate Commerce, Science & Transportation Committee, Staggers Rail Act of 1980, S. Rep. 96-470 (Dec. 7, 1979) (not reprinted in U.S.C.C.A.N.)

immediately following sentence, in which the committee noted, by way of example and not limitation, that certain state criminal statutes were not preempted. App. at 18a, 602 F.3d at 451, citing Conf. Report at 167.

In assigning to Congress purposes and objectives not expressed in the preemption clause itself, the court of appeals failed to examine the most credible evidence of congressional intent – the statutory language including the statement of the "policy of the United States Government" to allow "competition and the demand for services to establish reasonable rates, . . . [and] to ensure . . . effective competition among rail carriers and with other modes . . . ." 49 U.S.C. § 10101(1) & (4) (App. 62a).

REASONS FOR GRANTING THE PETITION

The court of appeals determined Congress's "purposes and objectives" relying not on statutory language, but on "snippet[s] of legislative history . . . in no way anchored in the text of the statute" (*United States v. Gonzales*, 520 U.S. 1, 6 (1997)). The central question presented is whether state laws of general application, not directed at the railroads or their operations, are preempted by the remedies provided under the Rail Part "with respect to regulation of rail transportation." That question should be -- and in other circuits has been -- answered by the plain wording of 49 U.S.C. § 10501(b). Rather than looking to the preemptive clause as enacted, the court of appeals cited four legislative reports to reach a conclusion that state laws might result in a "sort of frustration of [Congress's] deregulatory purpose"

(App. 18a-19a) or "interfere with the ICC Termination Act's deregulatory objectives" (App. 20a).

In *Geier*, this Court concluded that state common law tort actions could survive an express preemption clause but still be preempted "where an actual conflict with a federal objective is at stake." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000). *Geier's* use of an implied preemption, "purposes and objectives" analysis for a statute containing an express preemption clause, however, was in circumstances where the preemptive federal regulations affirmatively encouraged the adoption of diverse forms of passive restraints in automobiles, and where a state common law duty of care imposing liability for not using one of those forms would limit the choice provided by the federal regulations.

The circumstances here are entirely different. The ICC Termination Act was designed to establish a narrow set of exclusively federal remedies "with respect to regulation of rail transportation," not to establish a flexible standard giving railroads a variety of means by which to comply with federal requirements. Finding preemption based on the court's view of Congress's "purposes and objectives," based on a selective reading of legislative history without reference to the intended preemptive scope evidenced by the plain wording of the express preemption provision, is a misguided application of implied preemption concepts.

The court of appeals' methodological error is important. This Court's precedents establish that unambiguous preemption language in federal

statutes should be a decisive factor in both the express and implied preemption inquiries. The court of appeals here did not give the express preemptive language the required weight in the preemption analysis. That error increasingly plagues lower court analysis of implied preemption issues under statutes that contain express preemption language. This Petition presents the Court with the opportunity to issue critical guidance to lower courts on the importance of relying first and foremost on the plain wording of federal preemption provisions—the best evidence of Congress's preemptive intent—in determining the preemptive scope of federal enactments in every category of preemption inquiry. Regardless of how decisions are described in legislative reports, "courts must still ask whether the statute reflects that decision."[4]

A. The Court of Appeals' Purposes and Objectives Analysis Broadened an Express Preemption Clause Beyond What Congress Enacted

This Court has long instructed that any inquiry into the scope of preemption must be "guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Group v. Good*, __, U.S. __, 129 S.Ct. 538, 543 (2008), quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).[5]

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[4] Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 285-87 (2000).

[5] "[P]reemption is not an automatic byproduct of the national legislative process; Congress must intend preemption alongside the other substantive effects of the statute." Garrick B.

When a statute contains an express preemption clause, a question may remain "of the substance and scope of Congress' displacement of state law"; however, the statutory language must still be the starting point of the inquiry. *Id.*

> If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance *focus on the plain wording of the clause*, which necessarily contains the best evidence of Congress's pre-emptive intent.

CSX Transp. v. Easterwood, 507 U.S. 658, 664 (1993) (emphasis added); *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (same); *Franks Invsmt. Co. v. Union Pac. R. Co.*, 593 F.3d 404, 408 (5th Cir. *en banc*, Jan. 10, 2010) (citing *CSX v. Easterwood* in construing 49 U.S.C. § 10501(b)).

An express preemption clause also must be read to give "actual meaning" to its "literal language." *Geier*, 529 U.S. at 868. This Court held in *Geier* that where "[t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions" a savings clause would preserve, the preemption clause should be given that narrow reading. Here the court is presented with an express preemption clause in which preemptive remedies were, late in the drafting process, specifically limited to those "with respect to regulation of rail transportation." This express preemption clause also should be read

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Pursley, *The Structure of Preemption Decisions*, 85 Neb. L. Rev. 912, 940 (2007)

narrowly to give actual meaning to the added literal language. *Geier*, 529 U.S. at 868.

The plain wording of 49 U.S.C. § 10501(b), as the court of appeals noted (App. 5a, 602 F.3d at 446), indicates that Congress used it to address two distinct concepts. The first, the exclusive jurisdiction clause, existed in a more limited form before the ICC Termination Act, as 49 U.S.C. § 10501(d) (pre-1995) (referring to the ICC rather than the STB, and with the exclusive jurisdiction, as discussed below, shared with state agencies authorized by statute). House Report at 171 (showing former 49 U.S.C. § 10501(d)). The second concept, the exclusive remedies clause, was added in 1995 by modifying what previously had been a savings clause. The court of appeals' statement that this new clause "was merely a reorganization of pre-1995 law" was fundamentally incorrect, as demonstrated by the clause's evolution.

Before 1995 what became the exclusive remedies clause was a savings clause, which read:

> **Section 10103. Remedies as Cumulative.**
>
> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

49 U.S.C. § 10103 (pre-1995); see House Report at 148. The change proposed in the initial House bill was the polar opposite: "Cumulative" became "exclusive," and the term "preempt" appeared for the first time. (These are the changes that the court of

appeals concluded were "merely a reorganization of pre-1995 law . . . ." App. 13a (602 F.3d at 449)).

> **Section 10103. Remedies are Exclusive.**
>
> Except as otherwise provided in this part, the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State law.

House Report at 373 (quoting § 10103 from the proposed bill, before the additional limiting phrase "with respect to regulation of rail transportation" was added and before Section 10103 was moved to 49 U.S.C. § 10501(b)).

Prior to the ICC Termination Act, certain authorized state agencies were said to share "exclusive jurisdiction" with the ICC for the administration of the Interstate Commerce Act predecessor of the Rail Part. 49 U.S.C. § 10501(d) (pre-1995) ("The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized . . .) over transportation by rail carriers . . . is exclusive."); *see* House Report 104-311 at 17 (former statute). The House Report noted that the proposed change in statutory language proposed in this draft bill eliminated this cooperative approach.[6]

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[6] The court of appeals' confusion of the pre-1995 shared exclusive jurisdiction of federal and authorized state agencies with the exclusivity of remedies also led to its holding that pre-1995 authorities supported overriding the statutory exception in the remedies clause, drafted in 1995, under which remedies with respect to regulation of rail transportation are preemptive "except as otherwise provided by this part." 49 U.S.C. § 10501(b), App. 64a; App. 10a-13a, 602 F.3d at 448-49. A

This new exclusive remedies clause was initially a stand-alone section in the "General Provisions" chapter (Chapter 101) of the statute, not the jurisdictional chapter (Chapter 105) where the exclusive jurisdiction clause appears. *See* House Report at 143-48. In the final bill the clause was moved to the jurisdictional chapter and integrated with the exclusive jurisdiction clause; the two together became 49 U.S.C. § 10501(b). As reported out by the Conference Committee, the important limiting phrase was added to the Exclusive Remedies clause:

> Except as otherwise provided in this part, the remedies provided under this part *with*

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counterpart provision appears in 49 U.S.C. § 10709(c)(1) (App. 69a), which states that private contracts "shall not be subject to this part." While more appropriately addressed in a briefing on the merits, for purposes of this petition what is notable is the court of appeals finding that before 1995 the exclusive jurisdiction clause (49 U.S.C. § 10501(d) (pre-1995)) had broad preemptive effect that overrode the statutory exception, when in fact the clause only provided exclusive jurisdiction over three delimited areas: (i) "transportation by rail carriers," (ii) the remedies provided by the Rail Part with respect to rates, rules and practices of rail carriers, and (iii) track construction and abandonment. 49 U.S.C. § 10501(d) (pre-1995); see House Report at 171. *People v. Conrail*, 613 N.E.2d 784 (Ill. App. 1993), cited by the court of appeals as an exception because it involved "state environmental regulation" (a concept nowhere mentioned in the statute), in fact illustrates the rule because it is not within the three delimited areas, while the other cases cited by the court plainly were. App. 10a (602 F.3d at 448), citing *G. & T. Terminal Packaging v. Consolidated Rail*, 830 F.2d 1230 (3d Cir. 1987) (rate discrimination claim), and *Gendron v. Chicago & N.W. Transp. Co.*, 564 N.E.2d 1207 (Ill. 1990) (transfer of rail line)

> *respect to regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.

Conf. Report at 6 (with emphasis added to the new limiting phrase).

This exclusive remedies clause is the only place in the statute where the word "preempt" is found. What has preemptive effect are only those remedies provided by the Rail Part "with respect to regulation of rail transportation." "Transportation" is defined in the statute as facilities or equipment "related to the movement of passengers or property, or both, by rail . . . , [and] services related to that movement . . . ." 49 U.S.C. § 10102(9) (App. 63a). The term "regulation" is not defined in the statute, but two circuit courts of appeals have equated "regulation" with "managing or governing." *Franks Invstmt. Co. v. Union Pacific R. Co.*, 593 F.3d 404, 410 (5th Cir., Jan. 6, 2010); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

A court construing this preemption clause need look no further than its plain wording. To determine whether a state law is expressly preempted, a court must determine whether it constitutes a "remedy with respect to regulation of rail transportation." Reference to legislative history—though unnecessary to apply this clear statutory language—underscores the narrowness of the express preemption provision. The Conference Report emphasized that the quoted phrase was intended to "clarify[ ] that the exclusivity is limited to remedies with respect to rail regulation -

- not State and Federal law generally." Conf. Report at 167.

The court of appeals, however, neither referred to the statutory definition of "transportation" nor considered how other courts have defined "regulation." While acknowledging that the exclusive remedies clause was added in 1995, the court dismissed it as "merely a reorganization of prior law, under which federal remedies with respect to rail transportation were already exclusive . . . ." App. 13a (602 F.3d at 449). Avoiding the clarifying phrase Congress used in the statute, as well as Congress's explanation of that phrase, the court of appeals speculated that Congress "sought to avert the sort of frustration of its deregulatory purpose," finding evidence of what Congress sought not in the statute but in four legislative reports. Three of these reports addressed draft bills that did not even contain the exclusive remedies clause -- two of the three were from fifteen years prior to the ICC Termination Act. The fourth report at least addressed the statute, but the court cited not Congress's clarification, but rather the sentence that following providing a non-exclusive example of unpreempted state law. App. 18a-19a, (602 F.3d at 452), citing Conf. Report at 167; see pp. **12-13** above. The court also argued that Petitioners' state law claims would "interfere with the ICC Termination Act's deregulatory objectives," but failed to cite the limits Congress placed on the preemptive scope of 49 U.S.C. 10501(b)

Finally, the court drew a general conclusion that "the core of ICC Termination Act preemption is 'economic regulation,'" which the court took "to refer to

regulation of the relationship . . . of shippers and carriers." App. 17a, 602 F.2d at 451. These terms, "core of preemption," "economic regulation" and "relationship of shippers and carriers" are nice turns of phrase, but they have no source in the statute.

The critical problem with the court of appeals' reliance on legislative history is more than just using quotable snippets not anchored to the statutory text; the court simply failed to address the statutory concept "with respect to regulation of rail transportation." The decision is an example of lower courts using a "vague and potentially boundless doctrine of purposes and objective pre-emption" in order to

> pre-empt[ ] state law based on its interpretation of broad federal policy objectives, legislative history, a generalized notions of congressional purposes that are not contained within the text of federal law.

Wyeth __ *U.S.* __, 129 S.Ct. at 1207 (Thomas, J., concurring).

By way of contrast, the Fifth Circuit construed 49 U.S.C. § 10501(b) without referring once to the ICC Termination Act's legislative history. The word "regulation," the Fifth Circuit said, was the "word being fought over in this case and in the precedents." *Franks Invstmt.*, 593 F.3d at 410. Its conclusion, followed the "plain wording" approach of *CSX v. Easterwood*, 507 U.S. at 664, was that:

> The text of Section 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or

> governing rail transportation will be expressly preempted.

Franks Invsmt., 593 F.3d at 410.

"Regulation" is also the word fought over in this case. The scope of preemption under 49 U.S.C. § 10501(b) should be determined by the plain wording of the statute, and this Court should use this case to emphasize to lower courts that they must consider that the plain wording of express preemption clauses to be the best evidence of Congress's preemptive intent.

B. The Court of Appeals' Expansive Definition of "Regulation" is Without Statutory Basis and Conflicts with Other Circuits

That the adjectival phrase "with respect to regulation of rail transportation" was added to the exclusive remedies clause to limit the preemptive effect of "the remedies provided under this part" (the Rail Part) is readily apparent, from both the plain wording of the clause and the drafting history. Further, the House-Senate Conference Committee said the limiting phrase was added to "clarify[ ] that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." Conf. Report at 167. The court of appeals, however, gave the concept of "regulation of rail transportation" a reading far broader than that given by other circuits, equating it first with the non-statutory concept of "economic regulation," and then virtually anything affecting "the relationship of shippers and carriers." App. 17a, 602 F.3d at 451.

The court of appeals' expansive definition of "regulation of rail transportation" is also inconsistent with the development of the ICC Termination Act. Congress wanted to create a uniform federal scheme of regulation specifically designed to govern the commercial operations of railroads. See App. 19a. A state law purporting to set the maximum rate a railroad may charge for rail transportation, for example, is inconsistent with that purpose. But there is no authority for the proposition that Congress also intended to exempt railroads from generally applicable state laws that apply to all commercial actors equally and that are designed to promote traditional state government goals such as health, safety, and public welfare.

The state antitrust, deceptive trade practices and unjust enrichment laws from which Petitioners' claims arise are this type of laws of general application. Though they incidentally may *become* applicable to a railroad if a railroad violates their requirements, in light of Congress's emphasis on "regulation of rail transportation" and its narrow definition of "transportation," it is inappropriate to characterize such generally applicable laws as preempted state regulation. But that is the effect of the court of appeals analysis.

In the recent *Franks Invstmt.* decision the Fifth Circuit *en banc* vacated a panel decision and reversed a district court for the same type of broad reading of the limiting phrase "with respect to regulation of rail transportation" that the court of appeals provided.

> [T]he remedies that are preempted are those "provided under Federal or State law," but those remedies receive their meaning from the earlier part of the sentence. To the extent remedies are provided under laws *that have the effect of regulating rail transportation*, they are preempted.

Franks Invstmt., 593 F.3d at 410 (original emphasis) The Fifth Circuit accepted that matters within the exclusive jurisdiction of the STB were "categorically" or "facially" preempted. These include state actions such as permitting or preclearance for operations already authorized by the STB, or "matters directly regulated by the [STB] -- such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and services." *Franks Invstmt.*, 593 F.3d at 410-11. (The Fifth Circuit's description tracks the three areas under the STB's exclusive jurisdiction in the above Statutory Summary, Part **B** under Statement of the Case.)

The Fifth Circuit, however, found that the second category of actions, arising under the exclusive remedies clause and "not in the nature of regulation governed by the exclusive jurisdiction of the STB," present a different preemption question: Does the challenged law regulate rail transportation or is it a law of general application that only incidentally affects rail transportation.

In *Franks Invstmt.* a private landowner challenged a railroad's closing of private crossings under state real property law. The district court had found

that the property law was preempted by 49 U.S.C. § 10501(b) and a panel of the Fifth Circuit affirmed. In reversing, the Fifth Circuit *en banc,* analyzed the plain wording of 49 U.S.C. § 10501(b) and defined the relevant question as:

> [W]hether *Franks's* railroad crossing dispute invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation. It does not.

Franks Invstmt., 593 F.3d at 411 (emphasis added). Finding that the law at issue "had nothing to do with railroad[s]," the Fifth Circuit concludes that the laws at issue "are not meant to regulate railroad transportation, although at times they may have an incidental effect on railroad transportation." *Id.*

In contrast to the tortured purposes and objectives analysis of the court of appeals in the present case, the Fifth Circuit analyzed the preemption clause of 49 U.S.C. § 10501(b) simply by looking at the plain wording of the statute.

> Congress narrowly tailored the ICC Termination Act pre-emption provision to displace only 'regulation,' *i.e.*, those state laws that may reasonably be said to have the effect of manag[ing] or govern[ing] rail transportation, . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation.

Franks Invstmt., 593 F.3d at 410 (Fifth Circuit's edits), quoting *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

The *Franks Invsmt.* case is of particular significance because it was an *en banc* decision reversing a panel decision on the specific issue presented here: what constitutes "regulation of rail transportation." Notwithstanding that the issue was the same, the court of appeals seemed determined not to consider it. The decision was issued after completion of briefing for the court of appeals, and Petitioners submitted it to the court of appeals before oral argument pursuant to FRAP 28(j).[7] The court cited the decision, however, only on an issue of deference to a federal agency decision, and not on the issue for which it was submitted. App. 6a, 602 F.3d at 446-47.

In *Fla. E. Coast Ry.*, cited by the Fifth Circuit in *Franks Invstmt*, the Eleventh Circuit emphasized that the exclusive remedies clause gave preemptive effect to the remedies provided in the Rail Part "with respect to *regulation* of rail transportation" *Fla. E. Coast Ry.*, 266 F.3d at 1331 (original emphasis). A railroad had ceased using rail property as a switching and freight yard, and leased it to a non-railroad lessee. The City of West Palm Beach alleged that zoning laws did not permit commercial use. The railroad argued that the zoning laws were preempted by the ICC Termination Act. The Eleventh Circuit

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[7] Petitioners' submission to the court of appeals pursuant to FRAP 28(j) was filed electronically on Jan. 21, 2010, and is available at http://ecf.cadc.uscourts.gov/cmecf, Docket No. 09-7023.

found that, since the activities of the lessee did not relate to "transportation by rail carriers," the exclusive jurisdiction was not implicated. Under the exclusive remedies clause, the Eleventh Circuit held that "existing zoning ordinances of general applicability," enforced with respect to property owned by a railroad but leased "for non-rail transportation purposes," did not constitute "regulation of rail transportation."

> The ICC Termination Act pre-emption provision does not preclude the application of "all other law." . . . Rather, express pre-emption applies only to state laws "with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) [quoting from the exclusive remedies clause, with the court's emphasis]. This necessarily means something qualitatively different from laws "with respect to rail transportation." . . .

266 F.3d at 1331. Looking to the plain wording of the statute, the Eleventh Circuit concluded, in language quoted by the Fifth Circuit (in the second-preceding indented quotation), that Congress had "narrowly tailored" 49 U.S.C. § 10501(b) "to displace only 'regulation,' . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation." 266 F.3d at 1331; *Franks Invstmt.*, 593 F.3d at 410.

In its citation to a legislative report for the proposition that "Congress sought to avert the sort of frustration of its deregulatory purpose" that state laws might inflict, the court of appeals noted that the

report was "addressing a bill that lacks the phrase 'with respect to rail transportation' . . . ." App. 19a, n.5 (602 F.3d at 452 n.5). The phrase that was lacking, however was "with respect to *regulation of* rail transportation." As the Eleventh Circuit stated, the phrase without the words "regulation of" means something "qualitatively different." 266 F.3d at 1331. The court of appeals found the limiting phrase to be inconsequential with or without the words "regulated," based on its reading of the legislative report.

This casual disregard of statutory language in favor of a snippet from the legislative report illustrates the danger of applying a purposes and objectives analysis, particularly to an express preemption clause. The court found a deregulatory purpose from an initial legislative report, and ignored a later Congressional addition of a limiting phrase to the statute, for the direct purpose (expressed in a later legislative report) of "clarifying that the exclusivity is limited to remedies with respect to rail regulation." Conf. Report at 167.

> Both sets of purposes shape the statute, but they may well have different implications for state law. To pretend that such statutes reflect a consensus about a full slate of collective "purpose and objectives" may be naïve, and to extrapolate from those purposes risks upsetting the legislative bargains out of which the statutes were hammered.

Caleb Nelson, *Preemption*, 86 Va. L. Rev. at 279-80. As this author also noted, "even if courts can learn

exactly how far members of the enacting Congress would have liked to carry the purposes behind a particular statute, *courts must still ask whether the statute reflects that decision . . .*" *Id.* at 285-86 (emphasis added). The court of appeals did not.

The statutory language, including the definition of "transportation" and a definition of "regulation" derived from its context in the statute, limits preemption under 49 U.S.C. § 10501(b) to laws purporting to manage and govern the movement of freight and the tracks over which that freight is moved. The scope of preemption found by the court of appeals, based on ignoring the statutory phrase "regulation of rail transportation," is far beyond the statute. Clarification by this Court is of crucial importance to emphasize the primacy of statutory preemptive language, to resolve the conflict among the circuits, and to avoid the use of preemption law to protect unlawful price-fixing agreements.

C. The Court of Appeals Failed to Apply the Presumption Against Preemption

The question presented in this Petition deals not with what Congress can do in terms of preemption, but what it has done. Since the 1930's congressional power under the Commerce Clause essentially has meant that "no area of intrastate commerce would be open to the states to regulate which at the same time is constitutionally closed to Congress; no such area remained fully protected from the threat of congressional intervention." Stephen A. Gardbaum, *The Nature of Preemption*, 76 Cornell L. Rev. 767, 806 (1994). Under the post 1930's construction of the

Commerce Clause, however, this Court also has recognized that Congress must manifest its intent to preempt state law. *Id.*

> [S]tate powers, though no longer constitutionally guaranteed, survive unless clearly ended by Congress. Preemption doctrine was thus modified [beginning in the 1930's] to reflect this new presumption, and thereafter, Congress was affirmatively required to manifest an intent to preempt.

Id. at 806, citing *Mintz v. Baldwin*, 289 U.S. 346 (1933), and *Rice v. Santa Fe Elevator*, 331 U.S. 218 (1947). This presumption against preemption and the requirement that Congress indicate its preemptive intent are the "two cornerstones of our pre-emption jurisprudence." *Wyeth v. Levine*, __ U.S. __, 129 S.Ct. at 1194-95.

The presumption against preemption is based on an understanding that the structural and political safeguards are the primary mechanisms for protecting states against federal encroachment on their laws.

> [S]tate interests are represented in Congress through individual members, who are politically accountable to their in-state constituents. If a proposed bill frames preemption and other federalism issues clearly and explicitly through the use of unambiguous text, then members interested in defending state interests will be capable of doing so in the legislative process. If members fail to protect state interests held dear to

> their constituents, they will be held accountable at the polls.

Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 Ecology L.Q. 1147, 1186-87 (2007). As the author noted, this "clear statement" approach to finding preemption forces members of Congress "to carefully weigh the abrogation of state interests against the political consequences." *Id.*[8]

Under this approach, where Congress has enacted an express preemption clause, the statutory language must have primacy as the place to look for the expression of congressional intent -- unlike selective quotations of legislative history on which the court of appeals relied, the statutory language must reflect the compromises reached by representatives of state interests in their lawmaking functions. As this Court has noted:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protec-

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[8] Unlike legislation, Committee reports cited as indicating congressional intent are not approved by a congressional vote.

> [T]he central aspects of preemption doctrine rely on process mechanisms -- in this case, soft rules of statutory construction -- to do their work. The presumption against preemption tends to enhance the political safeguards of federalism by requiring clear notice to legislators when state authority is at stake
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> . . . .

Ernest R. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 132 (2004).

> tion of states against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory v. Ashcroft, 501 U.S. 452, 464 (1992) (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and quoting Lawrence Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)).

Franks Invstmt. and *Fla. E. Coast Ry.* are both significant in how they address the presumption against preemption in applying 49 U.S.C. § 10501(b). *Franks Invstmt.* recognized the two cornerstones of preemption jurisprudence described above, discussed the presumption against preemption, but found no need to apply it because the exclusive remedies clause *on its face* indicated that Congress did not intend to preempt the state law at issue. *Franks Invstmt.*, 593 F.3d at 408. "The text of § 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted." 593 F.3d at 410-11.[9]

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[9] The Fifth Circuit did not that "when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Franks Invstmt.*, 593 F. 3d at 407, citing *Altria Group*, __ U.S.

Unlike the Fifth Circuit, in *Fla. E. Coast Ry.* the Eleventh Circuit *did* apply the presumption against preemption. Supremacy clause decisions, the Eleventh Circuit stated, start with "the basic assumption that Congress did not intend to displace state law," an assumption based on "principles of federalism, including the recognition that the States are independent sovereigns in our federal system." *Fla. E. Coast Ry.*, 266 F.3d at 1327-28, citing *Bldg. & Con. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993), and *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).

> Reliance on the presumption against pre-emption limits congressional intrusion into the States traditional prerogatives and general authority to regulate for the health and welfare of their citizens .... Thus, if the statute's terms could be read sensibly not to have a pre-emptive effect, the presumption controls and no-preemption may be inferred.

Fla. E. Coast Ry., 266 F.3d at 1328, citing *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 116-17 (1992) (internal quote marks and brackets omitted). Finding the zoning ordinance at issue entitled to a "presumption of validity under the Supremacy Clause," the Eleventh Circuit concluded that 49 U.S.C. § 10501(b) did not overcome the presumption against preemption. 266 F.3d at 1328-29.

__, 129 S.Ct at 543, and *Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005) (internal quote marks omitted).

In the present case, the court of appeals did not even pay lip service to the presumption against preemption -- there is not a single reference to it in the decision. The court instead reviewed a series of cases and dismissed them as exceptions to the exclusive remedies clause (as broadened by the court through its purposes and objectives analysis). The court defined these exceptions as "exercises of police powers relating to public health or safety," which were not preempted unless those exercises were "either discriminatory or unduly burdensome." App. 16a, 602 F.3d at 451. Instead of looking at the statutory language to find the limits of congressional preemptive intent, the court casually drew from these cases the "implication . . . that the core of ICC Termination Act preemption is 'economic regulation,'" which the court then concluded encompassed "regulation of the relationship before us here, that of shippers and carriers." App. 16a-17a, 602 F.3d at 451.

The court's dismissal of the analysis in the cases finding no preemption was on the distinction that "railroad-shipper transactions" were "a problem quite different from environmental regulation." *Id.* The problem with the distinction the court drew, however, is that neither "railroad-shipper transactions" nor "environmental regulation" are terms used in the preemption clause. Applying the presumption against preemption to the facts of this case would have forced the court to hold that laws of general applicability against price-fixing agreements provide remedies that manage or govern ("regulation of") the use of facilities or equipment related to the movement of people or property by rail ("transportation")

and are preempted under 49 U.S.C. § 10501(b). That such laws are not preemptive under 49 U.S.C. § 10510(b) is a subject for a merits brief. That the court of appeals found these laws preemptive, without analysis of the statutory language and without applying the presumption against preemption, warrants issuance of a writ of certiorari.

The court of appeals has read in 49 U.S.C. § 10501(b) a sweeping invalidation of state laws, and in so doing has overlooked explicit, limiting statutory language and the pro-competitive policies enacted by Congress, contrary to the presumption against preemption and in favor of its own purposes and objectives analysis developed from non-statutory sources. Congress did not use the ICC Termination Act to displace pre-existing state laws of general application not directed at railroad operations. The court of appeals preemption analysis is fundamentally flawed, and the court should accept review of this case to clarify the proper methodology for construing express preemption clauses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Opinions & Orders of the United States Court of Appeals for the District of Columbia Circuit

Opinion affirming judgment of the District Court, reported as *Fayus Enterprises, on behalf of itself and all others similarly situated, et al., v. BNSF R. Co., et al.* 602 F.3d 444 (D.C. Cir. April 16, 2010) ..... App. 1a

Judgment (April 16, 2010) and Mandate (by endorsement on judgment, June 25, 2010), *Fayus Enterprises, on behalf of itself and all others similarly situated, et al., v. BNSF R. Co., et al.* (unreported) (D.C. Cir. 2010) ..... App. 25a

Order denying Petition for Panel Rehearing (unreported) (D.C. Cir. June 8, 2010) ..... App. 27a

Order denying Petition for Rehearing En Banc (unreported) (D.C. Cir. June 8, 2010) ..... App. 28a

Opinions & Orders of the United States District Court for the District of Columbia

Opinion granting in part and denying in part Respondents' Motion to Dismiss, reported as *In re Rail Freight Fuel Surcharge Antitrust Litigation,* 593 F.Supp.2d 29 (D.D.C. Dec. 31, 2008) .. App. 29a

Order granting in part and denying in part Respondents' Motion to Dismiss and dismissing Petitioners' state law claims (unreported) (D.D.C. Dec. 31, 2008) ..... App. 58a

Order entering final judgment on Petitioners' state law claims pursuant to Fed. R. Civ. P. 54(b) (unreported) (D.D.C. Jan. 16, 2009) ..... App. 60a

Constitutional Provisions and Statutes ..... App. 62a

United States Constitution, Art. VI, Cl. 2 ..... App.62a

Title 49, United States Code: Transportation. Subtitle IV: Interstate Transportation. Part A: Rail ..... App. 62a

§ 10101(1) & (4) ..... App. 62a

§ 10102(5) & (9) ..... App. 63a

§ 10501(b) ..... App. 64a

§ 10706(a)(2) & (3) ..... App. 64a

§ 10709(a), (b) & (c) ..... App. 69a

Petitioners' Consolidated Amended Complaint, April 15, 2008 ..... App. 70a

[*Reported at 602 F.3d 444]

United States Court of Appeals
For The District of Columbia Circuit

Argued Feb. 9, 2010. Decided April 16, 2010

No. 09-7023

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,
APPELLANTS

V.

BNSF RAILWAY COMPANY, ET AL.,
APPELLEES.

[*444]Appeal from the United States District Court
for the District of Columbia
(No. 1:07-mc-00489-PLF-JMF)

Christopher Lovell argued the cause for appellants. With him on the briefs were *Gary E. Mason*, *Jared B. Stamell*, and *Richard J. Schager, Jr.*

Alan M. Wiseman argued the cause for appellees. With him on the brief were *Thomas A. Isaacson*, *Peter A. Barile III*, *Tyrone R. Childress*, *David G. Meyer*, *John M. Nannes*, *Tara L. Reinhart*, *Saul P. Morgenstern*, *Richard J. Favretto*, *Robert M. Jenkins III*, *Gary A. Winters*, *Richard McMillan Jr.*, *Kent Alan Gardiner*, and *Kathryn D. Kirmayer*. *Linda S. Stein* entered an appearance.

Before: ROGERS and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

[*445]WILLIAMS, *Senior Circuit Judge*: Plaintiff-appellants are firms that have indirectly purchased rail freight service from one or more of the defendant railroads. The traffic moves under railroad-shipper contracts that, pursuant to 49 U.S.C. § 10709, are generally not subject to challenge before the Surface Transportation Board ("STB" or "Board").[1] Plaintiffs

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[1] 49 U.S.C. § 10709(c)(1) (2006) ("A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part."). Shippers not wishing to enter into contracts can ship pursuant to common carrier rates that railroads must provide on request pursuant to 49 U.S.C. § 11101(b) (2006). The Board has authority to regulate the rates of common carrier traffic if the railroad has "market dominance" with respect to such traffic, *id.* §§ 10701(d), 10702(1), 10707, and to regulate the reasonableness of the railroad's "rules and practices" regardless of market dominance, *id.* § 10702(2). The Board can also "exempt" "a person, class of persons, or a transaction or service" when it finds that application of the regulatory regime "(1) is not necessary to carry out the transportation policy of [49 U.S.C. § 10101]; and (2) either–(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power." *Id.* § 10502(a). Plaintiffs originally sought to challenge both § 10709 contract freight and § 10502(a) exempt freight, but they abandoned their claims involving § 10502(a) exempt freight in briefing before the district court and on appeal.

allege that since 2003 the railroads conspired to impose fuel surcharges on the freight in a way that raised the shipping rates above competitive levels. Plaintiffs seek a judicial remedy for contract traffic that would match–and extend–the remedy that the Board gave common carrier traffic in *Rail Fuel Surcharges*, Ex Parte No. 661, 2007 WL 201205 (S.T.B. Jan. 25, 2007), but which it explicitly withheld from contract traffic, see *id.* at *10.

Plaintiffs' antitrust allegations are part of at least eighteen separate class actions, consolidated before the district court, involving various putative classes of direct and indirect purchasers of rail freight services. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 593 F. Supp. 2d 29, 32 (D.D.C. 2008). (The direct purchasers raise only federal antitrust claims, which are still pending before the district court. *Id.* at 35-36.) The indirect purchasers sought injunctive relief for their antitrust claims under federal law; in addition, in order to secure damages precluded under federal law, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), they asserted various state law claims under theories of antitrust, consumer protection, unfair competition, and unjust enrichment and disgorgement of profits.

The district court dismissed the indirect purchasers' state law claims as preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 701-727, 10101-16106 ("ICCTA").[2]

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[2] There are also two sections not codified at the citation above, namely, 11 U.S.C. § 1162 and 45 U.S.C. § 7971.

In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d at 40. In the district court's view, "permit[ting] plaintiffs to pursue their state [law claims] . . . would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been–creating just the patchwork of railroad regulation that ICCTA sought to preempt." *Id.* at 38. The district court allowed the indirect purchaser plaintiffs to pursue their federal antitrust claim for injunctive relief, *id.* at 43, a claim still pending along with that of the direct purchasers. At the request of the parties, the court entered a final judgment for **[*446]** defendants on the state law claims under Fed. R. Civ. P. 54(b), thereby enabling an immediate appeal that would otherwise have been impermissibly interlocutory. This appeal duly followed.

The statute's express pre-emption clause obviously is the best available reflection of Congress's intent on the subject. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002). The section reads as follows:

> The jurisdiction of the Board over –
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (2006). In this opinion, we will refer to the first sentence (ending with "is exclusive") as the exclusive jurisdiction clause, and to the second sentence (beginning with "Except as otherwise provided") as the exclusive remedies clause.

* * *

In an argument that would, if it were sound, likely apply to all elements of their statutory analysis, plaintiffs invoke the following sentence uttered by the Board: "When Congress removed rail transportation contracts from the Board's regulatory purview, it expressly stated that not only state contract laws but also federal and state antitrust laws would apply fully to those agreements." *Kan. City Power & Light Co. v. Union Pac. R.R. Co.*, No. 42095, 2007 WL 934378, at *3 (S.T.B. Mar. 26, 2007). Plaintiffs argue in a footnote that we should defer to this statement under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Lest there be any confusion on the point, we note at the outset that Congress did *not* "expressly state"

what the Board said it had. The Board in fact cited only the House committee report, which on the page referred to by the Board merely stated, "If anti-competitive behavior is alleged, under this section, the antitrust laws are the appropriate and only remedy available." Comm. on Interstate & Foreign Commerce, Staggers Rail Act of 1980, H.R. Rep. No. 96-1035, at 58 (1980), *as reprinted* in 1980 U.S.C.C.A.N. 3978, 4003.

In any event plaintiffs' conclusory assertion that we owe the statement *Chevron* deference encounters insuperable hurdles. First, we've several times noted that whether an agency decision against preemption of a state or local law receives *Chevron* deference is an open question in this circuit. See *Riffin v. Surface Transportation Bd.*, 592 F.3d 195, 197 (D.C. Cir. 2010); *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1074-75 (2008). Yet plaintiffs offer no argument on the question; we commonly treat such an omission as a waiver. See, e.g., *United States v. Hughes*, 514 F.3d 15, 18 (D.C. Cir. 2008). The Supreme Court's recent treatment of the issue in *Wyeth v. Levine*, __ U.S. __, 129 S.Ct. 1187 (2009), declaring that "agencies have no special authority to pronounce on preemption absent delegation by Congress," *id.* at 1201, which several circuits have invoked in declining deference, see, e.g., [*447]*Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010); *Barrientos v. Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009), obviously puts the *Chevron* deference claim in further doubt.

But assuming in plaintiffs' favor that agencies are due *Chevron* deference for their rulings on preemption of state law, the Board's inaccurate remark in *Kansas City Power & Light* would not be due such deference. The Board was engaged in resolving whether it had jurisdiction over a shipper's complaint: it would if the rates in question were common carrier tariff rates subject to 49 U.S.C. § 10701(d)(1) (2006); *id.* § 10702, but would not if they were "contract rates" under § 10709. Because the rates fell into the common carrier classification under Board precedent, and the parties had reasonably relied thereon, it found jurisdiction but started a rulemaking to clarify the boundary between the two. It made the quoted observation about state antitrust claims only to illustrate the undisputed proposition that the classification had consequences. Such a dictum is plainly not entitled to *Chevron* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). What we have just said also disposes of any possible claim that we owe the remark deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Thus we address the parties' arguments de novo.

* * *

Plaintiffs object to the district court's preemption decision on two principal grounds. First, they say that § 10501(b)'s preemption provisions do not apply at all to freight transported pursuant to private contracts that are not generally subject to challenge before the Board. Second, they say that even if those

provisions apply to such transportation, the state law remedies they seek are not remedies "with respect to regulation of rail transportation" and are therefore not the sort of remedies that § 10501(b) preempts.

Plaintiffs' argument that the preemption language of § 10501(b) does not apply to freight transported under private rail contracts has two related aspects: First, in plaintiffs' view, only the exclusive remedies clause is relevant to ICCTA preemption analysis; they criticize the district court for relying on cases discussing the exclusive jurisdiction clause to support its preemption holding, noting that the clause does not use the word "preemption." Second, the exclusive remedies clause has an express provision for exceptions "as otherwise provided in this part," and plaintiffs argue that their state law claims fall within that exception. We will start with § 10709(c)'s provision of an exception:

> (1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the

> district courts of the United States based on section 1331 or 1337 of title 28, United States Code.

49 U.S.C. § 10709(c) (2006).

Plaintiffs read § 10709(c)(1) as taking private contracts completely outside the federal regulatory regime *and* as permitting plenary state regulation of freight moving under such contracts. This is a **[*448]** plainly erroneous reading. The provision merely limits the *Board's* authority over the terms of private contracts.[3] The limitation was imposed as part of surface freight deregulation legislation adopted over the past several decades. It was not intended to restore any regulatory authority to the states.

Both the exclusive jurisdiction clause of the provision now found in § 10501(b), and the rule removing private contracts from federal regulation, were originally added to the U.S. Code as part of the Staggers Rail Act of 1980. See Pub. L. No. 96-448, § 208, 94 Stat. 1895, 1909 (originally codified at 49 U.S.C. § 10713(i) (1994), now codified as amended at 49 U.S.C. § 10709(c) (2006)) (private contracts); *id.* § 214(c)(5), 94 Stat. at 1915 (originally codified at 49 U.S.C. § 10501(d) (1994), now codified as amended at 49 U.S.C. § 10501(b) (2006)) (preemption). Contrary to plaintiffs' assertions that federal preemption of

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[3] A quite separate way in which Board authority may be curtailed is through the Board's exercise of its authority under 49 U.S.C. § 10502(a) to "exempt a person, class of persons, or a transaction or service" on the making of certain findings.

state remedies was first introduced in 1995, see Appellants' Br. at 29 (asserting that "[u]nder the Interstate Commerce Act remedies were not exclusive, but rather cumulative"), in fact the Staggers Act's exclusive jurisdiction clause gave preemption of state remedies an explicit statutory basis. *G. & T. Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987) (so holding, but noting that longstanding judicial interpretations of pre-Staggers Act legislation also had much preemptive effect).

Indeed, courts found many state laws respecting rail transportation to be preempted following the Staggers Act even though it contained only the exclusive jurisdiction clause and not a separate exclusive remedies clause such as exists today. Thus *G. & T. Terminal Packaging Co.* held, "Since [§ 10501(d) (1982)], as illuminated by legislative history, makes clear that the only remedies regarding rail rates are those provided by federal statutes, the savings clause, 49 U.S.C. § 10103 (1982) [which preserved common law "[e]xcept as otherwise provided in this subtitle"], has no application to this case." *Id.*; *Gendron v. Chi. & N.W. Transp. Co.*, 564 N.E. 2d 1207, 1218 (Ill. 1990) (finding a state law challenge to a transfer of a rail line approved by the ICC as preempted where "granting plaintiffs the legal and equitable relief they seek would [have] impermissibly interfere[d] with the ICC's broad authority over rail line transactions" and citing *inter alia* former 49 U.S.C. § 10501(d) for the proposition that "[t]he ICC's jurisdiction to approve or to condition approval

of rail line transactions like the one challenged here is exclusive and plenary"); see also H.R. Rep. No. 104-422, at 167 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 850, 852 ("[S]ince 1980, former section 10501(d) [predecessor of the current exclusive jurisdiction clause] and 11501(b) [a provision dropped in 1995, providing for limited state regulation under strict ICC supervision], with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act."); cf. *People v. Conrail Corp.*, 613 N.E. 2d 784, 793-94 (Ill. App. Ct. 1993) (arguing that former § 10501(d) "merely provides that *to the extent of the jurisdiction conferred by the Commerce Act*, the ICC and State authorities have exclusive jurisdiction with respect to transportation by rail carriers"; but the context was a claim that the Staggers Act preempted state environmental regulation, **[*449]** an issue which, as we explain below, is quite distinct from regulation of railroad-shipper relations).

This pulls both legs out from under plaintiffs' argument that § 10501(b)'s exclusivity provisions do not apply to the contract traffic in question. The exclusive jurisdiction clause and the cases construing it *are* relevant to the present issue, and § 10709's exception, whatever its ultimate effect, *leaves* § 10501(b) applicable to contract traffic.

The current provision largely removing private contracts from federal regulation (§ 10709(c)) also had its genesis in the Staggers Act. Railroads were

authorized to enter into such contracts, and required to file them with the ICC, consistent with tariff rules to be developed by the Commission so as to make their essential terms available to the public. The Staggers Act directed the Commission to approve such contracts except in very limited circumstances. See Pub. L. No. 96-448, § 208, 94 Stat. at 1908-10 (originally codified as amended at 49 U.S.C. § 10713 (1994), now codified as amended at 49 U.S.C. § 10709 (2006)). Once so approved, a contract could not be challenged for violation of "this subtitle [subtitle IV, governing economic regulation of railroads]." *Id.* at 1909 (originally codified at 49 U.S.C. § 10713(i)(1) (1994), now codified as amended at 49 U.S.C. § 10709(c)(1) (2006)). Congress intended in 1980 to "clarif[y] the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements." H.R. Rep. No. 96-1430, at 98-99 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. at 4130-31. In its *Rail Fuel Surcharges* decision, the Board said that § 10709 left the ICC with "no authority to regulate rail rates and services that are governed by a contract." 2007 WL 201205, at *10.

Summarizing the Staggers Act's impact on the overall role of state law, the conference report said: "The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other *federal* statutes which are not inconsistent with the Inter-

state Commerce Act. No state law or federal or state common law remedies are available." H.R. Rep. No. 96-1430, at 106 (emphasis added), *as reprinted* in 1980 U.S.C.C.A.N. at 4138. Discussing the new private contracts provision, the report noted, "The existing Federal antitrust laws apply to this section," see *id.* at 101, *as reprinted in* 1980 U.S.C.C.A.N. at 4133, suggesting by negative inference that state antitrust laws generally did not apply. By that stage, then, Congress had clearly preempted *state* regulation of rail transportation, *both* for ICC-regulated freight and freight moving under private contracts.

We then must consider whether any of the changes wrought by the ICCTA itself reduced the scope of Staggers Act preemption. They did not. The ICCTA did add the exclusive remedies clause to § 10501, along with the caveat that it would apply "[e]xcept as otherwise provided in this part." But, as we said earlier, this provision was merely a reorganization of pre-1995 law, under which federal remedies with respect to rail transportation were already exclusive, subject to parties' rights to contract enforcement. H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. at 852 ("[S]ince 1980, former section 10501(d) and 11501(b), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act."). Plaintiffs' view would require us to infer that the addition of the general

"[e]xcept[*450] as otherwise provided in this part" clause somehow converted § 10709(c)(1)'s *pre-existing* provision for private contracts into a new source of state regulatory authority. See 49 U.S.C. § 10709(c)(1) (2006) (originally codified prior to amendment at 49 U.S.C. § 10713(i)(1) (1994)). They offer no reason supporting such a transformation.

The ICCTA, to be sure, altered the context slightly, but entirely in a deregulatory direction, making it most improbable that Congress intended to invite state regulatory authority into the picture. First, Congress further narrowed the authority of the regulatory agency (now the STB) to regulate private contracts, principally by eliminating certain procedures that allowed rather limited challenges before the old ICC. See H.R. Rep. No. 104-422, at 174, *as reprinted in* 1995 U.S.C.C.A.N. at 859 (describing the eliminated procedures as "very limited and seldom utilized"). But there was no change in § 10709(c)'s provision that contract rail transport "shall not be subject" to the provisions of the Act, meaning that the 1995 Act did not effect any substantive change on that score. See Pub. L. No. 104-88, § 102(a), 109 Stat. at 817 (codified at 49 U.S.C. § 10709(c)(1) (2006)).

Further, in one respect Congress explicitly expanded the scope of preemption: it deleted from the exclusive jurisdiction clause any reference to ICC-certified state authorities and the associated certification procedures. See Pub. L. No. 96-448, § 214(c)(5), 94 Stat. at 1915 (originally codified at 49 U.S.C. § 10501(d) (1994), now codified as amended at

49 U.S.C. § 10501(b) (2006)) ("The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive."). This of course was a *de*regulatory move–not, as plaintiffs would have us believe, an invitation to states to fill the regulatory void created by federal deregulation. See, e.g., S. Rep. No. 104-176, at 6 (1995) ("The bill would also eliminate Federal certification and review procedures for State regulation of intrastate rail transportation. However, nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill.").

In short, the ICCTA left the exclusive jurisdiction clause in full force, supplementing it with the exclusive remedies clause and its explicit exception, expressly alluding to the preexisting § 10709(c)'s provision for contract actions.

* * *

Plaintiffs' fallback argument is that their state law claims do not involve "regulation of rail transportation" and therefore are not preempted by § 10501(b). The district court discussed the state law claims of each type as a general class without discussing any state-to-state differences among the laws, see *In re Rail Freight Fuel Surcharge Antitrust*

Litig., 593 F. Supp. 2d at 37-39, and on appeal both parties have generally followed the same approach. We therefore treat the plaintiffs as having waived any argument that unique aspects of certain states' law governing consumer protection, unjust enrichment, or antitrust might compel a different result for a class of plaintiffs whose claims would be governed by such laws. We will proceed, as the parties have, on the assumption that any differences in individual states' laws are immaterial to the preemption analysis.

[*451] Plaintiffs correctly point out that the ICCTA does not preempt all state and local regulations. The circuits appear generally, for example, to find preemption of environmental regulations, or similar exercises of police powers relating to public health or safety, only when the state regulations are either discriminatory or unduly burdensome. See, e.g., *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643-44 (2d Cir. 2005) (including risk of permitting delay in assessment of burden); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252-55 (3d Cir. 2007); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (finding common law nuisance preempted); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001); cf. *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998) (seeming to apply a broader preemption rule). Several of the cases, in addressing these environmental regulations, note

that the ICCTA "does not preempt only explicit economic regulation." *N.Y. Susquehanna & W. Ry. Corp.*, 500 F.3d at 252; see also *City of Auburn*, 154 F.3d at 1030 (similar). By implication, such cases recognize that the core of ICCTA preemption is "economic regulation," which we take to refer to regulation of the relationship before us here, that of shippers and carriers.

Railroad-shipper transactions indeed pose a problem quite different from environmental regulation. As we have seen, § 10709(c)(1) explicitly makes actions in state or federal court the "exclusive remedy for any alleged breach of a contract entered into under this section." This provision for conventional contract enforcement obviously is an "[e]xcept[ion] . . . otherwise provided in this part" contemplated by the exclusive remedies clause. And courts readily provide such remedies. See *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212 (4th Cir. 2009) (affirming contract enforcement); *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545-46 (5th Cir. 2005) (recognizing propriety of state law contract claim but denying relief on the merits).

By contrast, the circuits have found shippers' quests for non-contractual relief to be preempted as would-be invasions of the regulatory domain. Thus in *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186 (10th Cir. 2008), the court preserved a shipper's contract claim against a railroad for ceasing service on a spur but found its tort claim to be completely preempted by ICCTA. *Id.* at 1188-91. And in *G. & T. Terminal Packaging Co.*, the court found that, for

shipments exempted from regulation, the Staggers Act had completely preempted state common law remedies for railroad price discrimination among shippers. 830 F.2d at 1233-36.

The legislative history supports the courts' refusal to let non-contract state law intrude into the statutorily preserved shipper-carrier remedies. As the House Report on ICCTA said, "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive." H.R. Rep. No. 104-311, at 95-96 (1995) (emphasis in original), *as reprinted in* 1995 U.S.C.C.A.N. 793, 808; see also H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. at 852 (noting that some criminal statutes are not preempted by the ICCTA "because they do not generally collide with the scheme of economic regulation (*and deregulation*) of rail transportation" (emphasis added)); H.R. Rep. No. 96-1430, at 105, *as reprinted in* 1980 U.S.C.C.A.N. at 4137 (noting that the Staggers Act "reaffirms that where the commission has withdrawn its jurisdiction [***452**] to regulate, the State could not assume such jurisdiction").[4] As the

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[4] This Report is addressed to the original Senate proposal, which explicitly stated the point made in the report with language omitted from the ultimate version, but that in other respects did not go *as far as* the ultimate version in curtailing state regulatory authority. Compare S. Rep. No. 96-470, at 77-78 (1979) (Senate proposing that the statute contain a subsection making clear that "[f]ederal withdrawal from certain areas of regulation shall not be construed as relinquishing

legislative comments quoted above make clear, Congress sought to avert the sort of frustration of its deregulatory purpose potentially inflicted by state rights and remedies outside the specifically preserved realm of contract breach.

Congress also recognized that enforcement of state law outside the contract realm could easily lead to balkanization, with shipments subject to fluctuating rules as they crossed state lines. As the House Report on ICCTA said: "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No. 104-311, at 96, *as reprinted in* 1995 U.S.C.C.A.N. at 808.[5] State

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Federal jurisdiction"), with H.R. Rep. No. 96-1430, at 106, *as reprinted in* 1980 U.S.C.C.A.N. at 4138 (discussing House proposals, all adopted in the final version, that "only State authorities whose standards and procedures have been certified by the Commission may exercise jurisdiction over intrastate rail," that "[d]ecisions of State authorities may be appealed to the Commission," and that "where the Interstate Commerce Act provides an exclusive remedy, such remedy is not in addition to remedies under another law or at common law").

[5] Although the House Report is addressing a bill that lacks the phrase "with respect to rail transportation," there is no reason to suppose that inclusion of that phrase in the final bill reflected a congressional embrace of balkanization.

antitrust claims obviously present a risk of balkanized legal norms, a risk not posed by federal antitrust law.

As pitched in this litigation, plaintiffs' state law claims would directly interfere with the ICCTA's deregulatory objectives. Plaintiffs left the basis for many of these claims unclear in their complaint, asserting only conclusorily that the defendants had violated various state laws. E.g., Indirect Purchasers' Consol. Am. Compl. 155 (alleging, without further elaboration, that "[d]efendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New York Gen. Bus. Law § 349 *et seq.*; and New York common law against restraints of trade"). But the legal theories plaintiffs have presented in briefing make clear that these claims are designed as a means of getting the district court to apply state law to assess the substantive "fairness" of the contracts the railroads entered into, including with reference to the manner in which the rates were computed. See *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 982 (11th Cir. 2008) (suggesting that if necessary a district court may use Rule 12(c) motions and the parties' memoranda to make sense of plaintiffs' allegations).

Thus, plaintiffs relied extensively before the district court on the argument that the Board, in *Rail Fuel Surcharges*, the proceeding that addressed fuel surcharges applied to common carrier freight, had found aspects of the rate computation "unfair" or "unreasonable." See Indirect Purchase Pls.' Mem. Opp'n Defs.' Joint Mot. Dismiss 40 ("[T]he STB has

already determined that the fuel surcharges at issue **[*453]** here are 'unreasonable,' 'misleading' and 'unfair' as contemplated by the consumer protection laws."); *id.* at 21 (describing this litigation as "seek[ing] recovery for conspiratorial and *unfair* overcharges" (emphasis added)); *id.* at 42 (characterizing the plaintiffs' claims as "challeng[ing] only the *unfair* and/or misleading nature of Defendants' fuel surcharges" (emphasis added)). And plaintiffs made no bones about their goal of extending the remedies that the STB ordered for *regulated* freight to freight over which Congress deliberately stripped the STB–*and states*–of any regulatory authority. See *id.* at 40 ("By raising consumer protection claims, Plaintiffs merely seek to enforce the STB's ruling . . . for claims arising in private contract."); *id.* at 29 ("[T]he court is asked only to enforce the STB's finding of unreasonableness such that Plaintiffs may obtain adequate redress.").

The law applicable to § 10709(c) contracts, of course, may involve state common law doctrines such as fraud and consideration, doctrines that will in some cases cause a contract to be negated or even modified. But whatever the circumstances in which unjust enrichment, consumer protection, or antitrust claims may be unpreempted, they do not include those before us, where those claims are advanced as a means of challenging the substantive *reasonableness* of the rates charged under private contracts.

We should say a few additional words about plaintiffs' state law antitrust claims, because

plaintiffs make one argument against preemption unique to such claims: They point out that a provision of the ICCTA, by creating a rule of evidence applicable to state law antitrust suits (as well as to federal ones), arguably contemplates preservation of state antitrust actions. The statute provides: "In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal [antitrust] law . . . *or of any similar State law*, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate . . . [approved in accordance with § 10706(a)(2)]." 49 U.S.C. § 10706(a)(3)(B)(ii) (2006) (emphasis added). Plaintiffs also point to legislative history that seemed to contemplate the applicability of at least some antitrust law. For example: "The Conference provision retains this general rule, while clarifying that [§ 10501(b)'s] exclusivity is limited to remedies with respect to rail regulation—not State and Federal law generally. For example, criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation." H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. 850, 852.

Although the question is not before us, there is nothing in our reasoning inconsistent with the no-

tion that some *subset* of state or federal antitrust claims might permissibly be brought against railroads, for price-fixing or other violations. The relevant question is not whether all potential antitrust suits are preempted, but rather whether *this* antitrust suit, as formulated by the plaintiffs, impermissibly infringes the federal deregulatory interests in the ICCTA.

There has been a tension–and in federal antitrust law a radical change over time–between the goal of increasing consumer welfare in the economic efficiency sense and contrasting goals such as protecting small competitors or preventing the concentration of economic or political **[*454]** power without regard to economic efficiency. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp.*, 79 F.3d 182, 192 (1st Cir. 1996). It is far from clear that state antitrust law has, as a general matter, made the transition that has marked federal law. See, e.g., Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 73-74 (Free Press 1993) (1978) (describing the movement to "consumer welfare orientation" under federal antitrust law); *id.* at 74-77 (discussing early U.S. Supreme Court cases striking down state antitrust laws in which liability turned on the unreasonableness of prices); Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 Franchise L.J. 173, 173 (2008) (noting that even states generally following federal decisional law in

antitrust matters typically "leave themselves an escape route if federal law varies from state statute or putative state policy goals").

Illinois Brick, which plaintiffs' suit expressly seeks to avoid, represents the Supreme Court's judgment that allowing plaintiffs to use an indirect purchaser theory offensively, while prohibiting defendants from using the theory defensively, "would create a serious risk of multiple liability for defendants," and "the possibility of inconsistent adjudications." 431 U.S. at 730. *Illinois Brick* also rested on the proposition that full recovery for direct purchasers would generate more effective enforcement of the law. *Id.* at 734-35. Application of state laws rejecting *Illinois Brick* would jeopardize the federal interest in protecting railroad regulation from inefficient norms and balkanization.

We are presented in this case with an antitrust claim that was unambiguously concerned not just with strict "economic efficiency" but also with resurrecting in a different form state-level regulation of railroads, by inviting judicial supervision of the reasonableness and fairness of rates charged to shippers. Allowing state law antitrust claims of *this* nature would undermine the deregulatory and anti-balkanization policies underlying the ICCTA. We need not address imaginable state antitrust claims that might not run afoul of either of those congressional policies.

The judgment of the district court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7023 **September Term, 2009**

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

APPELLANTS

v.

BNSF RAILWAY COMPANY, ET AL.,

APPELLEES

Filed On:
April 16, 2010

Appeal from the United States District Court
For the District of Columbia
(No. 1:07-mc-00489-PLF-JMF)

Before: ROGERS AND TATEL, *Circuit Judges*,
and WILLIAMS, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this

cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Date: April 16, 2010

Opinion for the court filed by
Senior Circuit Judge Williams.

MANDATE
Pursuant to the provisions of Fed. R. App. Prc. 41(a)
Issued: 6/25/10
By: /s/ Michael C. McGrail
Attached: __ Amending Order __ Opinion __ Order on Costs

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7023 **September Term, 2009**

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

APPELLANTS

v.

BNSF RAILWAY COMPANY, ET AL.,

APPELLEES

1:07-mc-00489-PLF-JMF

Filed On: June 8, 2010

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT
FILED JUN -8 2010
CLERK

BEFORE: ROGERS AND TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

ORDER

Upon consideration of appellants' petition for panel rehearing filed on May 17, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7023 **September Term, 2009**

1:07-mc-00489-PLF-JMF

Filed On: June 8, 2010

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

APPELLANTS

v.

BNSF RAILWAY COMPANY, ET AL.,

APPELLEES

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

FILED JUN -8 2010
CLERK

BEFORE: SENTELLE, *Chief Judge*, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges,* and WILLIAMS, *Senior Circuit*

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

[*Reported at 593 F.Supp.2d 29]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	MDL Docket No. 1869 Misc. No. 07-489 (PLF)
This document relates to: INDIRECT DIRECT PURCHASER PLAINTIFFS	

[*32]OPINION

This matter is before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction under Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure.[1] The Court

[1] The papers submitted in connection with this motion include: Indirect Purchaser Plaintiffs' Consolidated Amended Class Action Complaint ("Compl "); Defendants' Joint Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint; Indirect Purchaser Plaintiffs' Opposition in Response to Defendants' Joint Motion to Dismiss; Defendants' Joint Reply to Indirect Purchaser Plaintiffs' Opposition in Response to Defendants' Joint Motion to Dismiss; Indirect Purchaser Plaintiffs' Supplement to their Opposition to Defendants' Joint Motion to Dismiss; Defendants' Supplemental Memorandum of Points and Authorities in Support of Defendants' Joint Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint; and Indirect Purchaser Plaintiffs' Sup-

has carefully considered the arguments made by the parties in their papers and the oral arguments presented by counsel in open court on October 10, 2008. The Court has concluded that the indirect purchaser plaintiffs' state law claims are preempted by federal law and must be dismissed. The Court has also concluded that the indirect purchaser plaintiffs have stated a federal antitrust claim for injunctive relief and that this claim may proceed.

I. BACKGROUND

The Multidistrict Litigation Panel consolidated eighteen separate class actions, pending in six districts, involving common antitrust allegations against the four major United States railroads and transferred them to this Court on November 6, 2007. The plaintiffs were divided into two putative classes – those who allegedly purchased rail freight transportation services directly from defendants from July 1, 2003 until at least June 30, 2007 and who were assessed a rail fuel surcharge for the transportation services, and those who allegedly purchased rail freight transportation services indirectly from the defendants and were subject to a similar surcharge. Plaintiffs in both putative classes allege that the defendant railroads violated Section 1 of the Sherman Act by conspiring to fix prices through their use of fuel surcharges. The indirect purchaser plaintiffs also allege various claims arising from state anti-

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plemental Memorandum Regarding Federal Injunctive Relief Standing.

trust, consumer protection and unjust enrichment law for the same alleged behavior by defendants.

Defendants BNSF Railway Company ("BNSF"), CSX Transportation, Inc. ("CSX"), Norfolk Southern Railway Company ("NS"), and Union Pacific Railway Company ("UP") moved to dismiss the claims of both putative classes. The Court denied defendants' motion to dismiss the direct purchasers' complaint on November 1, 2008. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, Misc. No. 07-489, 2008 U.S. Dist. LEXIS 95456 (D.D.C. Nov. 7, 2008). The indirect purchaser plaintiffs' (hereafter "plaintiffs") complaint, and defendants' challenge to it, are discussed in this Opinion.[2]

II. STANDARD OF REVIEW

Defendants move to dismiss all of plaintiffs' claims for failure to state a claim upon which relief can be granted under [*33]Rule 12(b)(6) of the Federal Rules of Civil Procedure. They also move to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that plaintiffs lack standing.

A. Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows dismissal of a complaint if a plaintiff fails "to state a claim upon which relief can be

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[2] The putative indirect purchaser plaintiff class is represented by Agway Liquidating Trust; Fayus Enterprises; and Maroon Incorporated.

granted." FED. R. CIV. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Supreme Court clarified the standard of pleading that a plaintiff must meet in order to survive a motion to dismiss under Rule 12(b)(6). The Court noted that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests[.]'" *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1965 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007); *Aktieselskabet AF 21 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C.Cir.2008). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to provide the "grounds" of "entitle[ment] to relief." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1964-65; *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986). While there is no "probability requirement at the pleading stage," *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1965, "something beyond ... mere possibility ... must be alleged[.]" *Id.* at 1966. The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level," *id.* at 1965, or must be sufficient "to state a claim for relief that is plausible on its face." *Id.* at 1974. The Court referred to this newly clarified standard as "the plausibility standard." *Id.* at 1968 (abandoning the "no set of facts" language from *Conley v. Gibson*).

On a motion to dismiss under Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 127 S.Ct. at 2200; *see also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1965; *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991); *Aktieselskabet AF 21 v. Fame Jeans Inc.*, 525 F.3d at 15. It must construe the complaint "liberally in the plaintiffs' favor, and grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *see also Aktieselskabet AF 21 v. Fame Jeans Inc.*, 525 F.3d at 15. The Court, however, need not accept inferences drawn by plaintiffs if those inferences are unsupported by facts alleged in the complaint; nor must it accept plaintiffs' legal conclusions. *See Kowal v. MCI Communications Corp.*, 16 F.3d at 1276; *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

B. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction. They therefore may hear only cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress. *See, e.g., Beethoven.com L.L.C. v. Librarian of Congress*, 394 F.3d 939, 945 (D.C. Cir. 2005); *Best v. United States*, 522 F. Supp. 2d 252, 254 (D.D.C. 2007); *Srour v. Barnes*, 670 F. Supp. 18, 20 (D.D.C. 1987) (citing *City of Kenosha v. Bruno*, 412 U.S. 507, 511 (1973)). Under Rule 12(b)(1), the plaintiffs bear the

burden[*34] of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007) (citing *Georgiades v. Martin-Trigona*, 729 F.2d 831, 833 n. 4 (D.C. Cir. 1984)). In determining whether to grant a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all of the factual allegations in the complaint as true. The Court, however, need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must it accept plaintiffs' legal conclusions. *See Best v. United States*, 522 F. Supp. 2d at 255; *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 47 (D.D.C. 2003).

III. PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that in 2003, the four defendants, who control approximately ninety percent of all rail freight traffic in the United States, sought to increase their revenues through the use of fuel surcharges. Compl. ¶¶ 2-3, 43. Before Congress passed the Staggers Rail Act in 1980, defendants would have had to apply to the Interstate Commerce Commission for approval of an across-the-board rate increase. Compl. ¶¶ 4, 55. Following deregulation of the railroad industry, however, at least eighty percent of all rail shipments move under private transportation contracts, which are not rate regulated, or are otherwise exempt from rate regulation. Compl. ¶¶ 56. Plaintiffs allege that defendants de-

termined that the most efficient means to increase their profits was through the imposition of an across-the-board artificially high and uniform fuel surcharge. Compl. ¶¶ 60.

The barrier to this plan, according to plaintiffs, was that many rail freight transportation contracts already included rate escalation provisions that weighted a variety of cost factors, including fuel, based on an index called the All Inclusive Index (the "AII"). Compl. ¶¶ 11, 61. The railroad trade organization known as the Association of American Railroads ("AAR"), which is dominated by the four defendants, publishes this index. Compl. ¶¶ 12, 61. Plaintiffs allege that the AII (as well as a related cost index called the Rail Cost Adjustment Factor ("RCAF")) already accounted accurately for the impact of fuel cost increases. Compl. ¶¶ 5, 61. Any actual increase in fuel costs, no matter how large, would be reflected in the AII and the RCAF. Compl. ¶¶ 61. Plaintiffs allege that the defendants conspired to remove fuel from the AII so that they could apply a separate "fuel surcharge" as a percentage of the total cost of freight transportation. Compl. ¶¶ 62. Doing so permitted plaintiffs to raise total freight prices widely by a given percentage. *Id.*

According to plaintiffs, top executives from each of the defendants met regularly at various industry conferences and events in the spring of 2003 and thereafter to discuss their industry. Compl. ¶¶ 64. Shortly after one such industry meeting, in July 2003, the western railroads (BNSF and UP) began charging identical fuel surcharges based on the U.S.

Department of Energy On-Highway Diesel Fuel Price Index. Compl. ¶¶ 16, 65. Plaintiffs allege that this parallel and complex pricing decision was based on an agreement among the defendants. Compl. ¶¶ 66-69.

The next step in the alleged conspiracy, according to plaintiffs, was the defendants' agreement and collective action to cause the AAR to create a new cost escalation index, the All Inclusive Index Less Fuel ("AIILF"), which removed fuel costs from the prior cost escalation index (the AII). Compl. ¶¶ 72. According to plaintiffs, defendants[*35] reached this agreement during the October and December 2003 meetings of the AAR. Compl. ¶¶ 71. The index was published in December 2003. Compl. ¶¶ 72. Subsequently, and in furtherance of the conspiracy, according to plaintiffs, the eastern railroads (CSX and NS) announced that they would apply identical fuel surcharges based on the West Texas Intermediate Index. Compl. ¶¶ 75-77.

Plaintiffs allege that at that point, and as a result of these collective actions, defendants each applied their fuel surcharges in the same way – as a percentage multiplier of the total base rate for rail freight transportation. Compl. ¶¶ 84. They were able to do so because, under the AIILF, fuel was no longer included in the general cost escalation index. Plaintiffs allege that this approach yielded defendants billions of dollars of additional profits because the surcharge raised rates far beyond the real increased cost of fuel. Compl. ¶¶ 81-83, 91. Plaintiffs allege that defendants, in the east and west, coordi-

nated their computation of the surcharges. Compl. ¶¶ 89. As a result of this alleged collusion, the eastern and western railroads, respectively, imposed identical fuel surcharges for more than three years. Compl. ¶¶ 89.

In sum, relying on the uniformity of fuel surcharges, the creation and use of the AHLF, and various other allegations, plaintiffs contend that defendants conspired to fix prices in violation of Section 1 of the Sherman Act as well as the antitrust, consumer protection and unjust enrichment laws of various states. Plaintiffs furthe[illegible]llege that as a result, the members of the plainti[illegible]lass have all paid higher prices for unregulated rail freight transportation than they would have absent this asserted unlawful activity. Compl. ¶¶ 26, 112. Defendants have moved to dismiss on the grounds that plaintiffs have not met the *Twombly* pleading standard; that plaintiffs' state law claims are all preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"); that plaintiffs lack standing under Article III to claim violations of the laws of states in which they do not reside or do business; that plaintiffs have failed to demonstrate that they have "antitrust standing;" and that plaintiffs' unjust enrichment and consumer protection claims fail on a number of grounds.

IV. ANALYSIS

The complaint alleges both federal and state antitrust claims as well as state consumer protection and unjust enrichment claims. Plaintiffs must pur-

sue the state claims in order to recover damages, because following *Illinois Brick v. Illinois*, 431 U.S. 720, 746-47 (1977), only direct purchasers may obtain damage awards under federal antitrust law. As explained in further detail below, the Court finds that the plaintiffs' state law claims are preempted by ICCTA and must be dismissed. Plaintiffs' federal antitrust claim survives, however, because they have met the pleading standard enunciated by the Supreme Court in *Twombly* and have standing to pursue their claim for injunctive relief.

A. The Twombly Standard

Defendants argue that the complaint does not meet the pleading standard for federal or state antitrust claims as articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). The Court previously found that the direct purchaser plaintiffs' allegations, which are substantially similar to the indirect purchasers' allegations, met the *Twombly* standard. It therefore denied defendants' motion to dismiss the direct purchasers' claims on November 7, 2008. *See* **[*36]***In re Rail Freight Fuel Surcharge Antitrust Litig.*, Misc. No. 07-489 2008 U.S. Dist. LEXIS 95456 at *18-19, 23-26 (D.D.C. Nov. 7, 2008). The defendants do not raise any additional or different arguments as to why the indirect purchaser plaintiffs' complaint should not be allowed to proceed under *Twombly*. For the same reasons explained in the Court's earlier Opinion, the Court finds that the indirect purchasers' complaint

states claims under *Twombly*, and it therefore will not dismiss their complaint on those grounds. *Id.*

B. Federal Preemption of State Law Claims

Defendants argue that plaintiffs' state antitrust, consumer protection and unjust enrichment claims are preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.* The preemption clause in ICCTA provides:

> The jurisdiction of the [Surface Transportation] Board over – (1) transportation by rail carriers, and the remedies provided in this part [49 U.S.C. §§ 10101 *et seq.*] *with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers*; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part [49 U.S.C. §§ 10101 *et seq.*], the remedies provided under this part [49 U.S.C. §§ 10101 *et seq.*] *with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (emphasis added).

Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, cl. 2. A federal statute preempts state law when (1) the preemptive intent is "'explicitly stated in the statute's language or implicitly contained in its structure and purpose'"; or (2) the state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotations and citations omitted). "'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Id.* at 516 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *see also Altria Group, Inc. v. Good*, No. 9127, 2008 U.S. LEXIS 9127 at *10 (U.S. Dec. 15, 2008).

The preemption language in ICCTA is plain and explicit: The remedies provided "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). "The language of the statute could not be more precise." *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001). *See also Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1128-29 (10th Cir. 2007); *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 641 (2d Cir. 2005); *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998). "The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act are the only remedies available as to the regulation of rail transportation,

and that the [*37] federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise." *CSX Transp. v. Georgia PSC*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Indeed, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Id.*

While the enactment of ICCTA was the culmination of a movement toward deregulation of the railroads that began in the late 1970's, Congress did not intend that the states fill the regulatory void.[3] The regulation of railroad operations had always been "a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm." *Friberg v. Kan. City S. Ry.*, 267 F.3d at 443; *see also City of Auburn v. United States*, 154 F.3d at 1029.[4] Thus, as

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[3] Congress began deregulating the industry in the late 1970's, first with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1980, followed shortly thereafter by the Staggers Rail Act of 1980. *See City of Auburn v. United States*, 154 F.3d at 1029 & n. 6. Congress enacted ICCTA in order to complete the railroad deregulation that the earlier statutes had begun. *See* S. REP. NO. 104-176, at 5 (1995) ("the bill continues the deregulation theme of the past 15 years by providing further regulatory reductions in the surface transportation industries.").

[4] Plaintiffs argue that there is always a presumption against finding preemption. Certainly this is true when Congress has legislated in a field the states have traditionally occupied. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Conversely,

numerous courts have held, ICCTA preempts the economic regulation of railroads by the states, as well as state laws whose application would unreasonably interfere with a railroad's operations. *See PCS Phosphate Co. v. Norfolk Southern Corp.*, 520 F. Supp. 2d 705, 715 (E.D.N.C. 2007) (collecting cases). As the Third Circuit put it, "the Termination Act does not preempt only explicit economic regulation. Rather, it preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'" *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)). The question is always whether the action "would have the effect of preventing or unreasonably interfering with railroad transportation." *PCS Phosphate Co. v. Norfolk Southern Corp.*, 520 F. Supp. 2d at 715.

The states retain their traditional police powers to protect health and safety, which is reserved to them by the Constitution, but only so long as the ap-

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the federal government's historic regulation of the railroad system counsels against such a presumption in this case. *See CSX Transp. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) ("the case for preemption is particularly strong where, as here [rail transportation], 'the State regulates in an area where there has been a history of significant federal presence'") (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)); *see also Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d at 1327-28.

plication of these powers is not unreasonably burdensome on railroad operations. *See, e.g., Green Mt. R.R. Corp. v. Vermont*, 404 F.3d at 642 ("Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to **[*38]** withstand preemption."); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d at 1339 (application of local zoning laws to a company leasing railroad property was not preempted by ICCTA because "the zoning ordinances with which [the lessee] must comply, do not burden [the railroad] with the patchwork of regulation that motivated the passage of the ICCTA."); *Maumee & W.R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order*, S.T.B. Dkt. No. 34354, 2004 WL 395835, at *1 (S.T.B. Mar. 2, 2004) (localities retain certain police powers to protect health and safety so long as they do not interfere with interstate rail operations).

To permit plaintiffs to pursue their state antitrust, consumer protection, and unjust enrichment claims against defendant railroads in this case, however, is not the least bit similar to the exercise by states of these non-burdensome police powers through state laws whose application are remote from railroad operations. Rather, for this Court to resolve plaintiffs' claims would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been – creating just the

patchwork of railroad regulation that ICCTA sought to preempt. As the Senate noted when it enacted ICCTA in 1995:

> The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the 'seamless' service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

See S. REP. NO. 104-176, at 6 (1995).

Plaintiffs also argue that because Section 10501(b) establishes both the STB's jurisdiction as well as the preemptive effect of its decisions and remedies, any claims arising out of private railroad contracts (such as the claims at issue here) are not within the STB's statutory authority and therefore could not be preempted. This argument confuses the STB's jurisdiction with the scope of federal preemption and assumes that Congress would not have allowed ICCTA to leave a regulatory void. The argument is not supported by either the statute's language or its legislative history. The Senate Report expressly stated that "nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill." S. REP. NO. 104-176, at 6 (1995). Similarly, the Conference Committee noted

that "integrated into the statement of general jurisdiction is the delineation of the exclusivity of federal remedies with respect to the regulation of rail transportation." H.R. CONF. REP. NO. 104-422, at 168 (1995). And the courts that have considered the matter have recognized that through its deregulation of the railroads, Congress purposely left potential plaintiffs without a federal remedy. As one of the first courts to consider ICCTA explained:

> Defendants, however, read the ICC Termination Act's preemption clause to preempt state remedies only when federal remedies are provided under the Act.... Defendants' argument reflects a misunderstanding not only of the plain language of section 10501(b)(2), but also of the ICC Termination Act generally. The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act [*39] are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise.

CSX Transp. v. Georgia PSC, 944 F. Supp. at 1581.

Congress has created similarly broad preemption in other industries. Airlines are a prime example – like railroads, the operation of airlines is necessarily between states, indeed, nationwide. Congress recognized in the Airline Deregulation Act ("ADA") that any regulation of the airlines by individual states

would create significant problems, and so it prohibited the enactment or enforcement of state laws or regulations "related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1) (previously 49 U.S.C. § 1305(a)(1)), which the Supreme Court concluded preempted even state laws of general applicability because they "relate to" the airline industry:

> [P]etitioner advances the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of general applicability. Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language.

Morales v. Trans World Airlines, 504 U.S. 374, 386 (1992). *See also Altria Group, Inc. v. Good*, 2008 LEXIS 9127 at *26 ("the phrase 'relating to' indicates Congress' intent to pre-empt a large area of state law to further its purpose of deregulating the airline industry"). One court expressly held that the ADA preempted the application of state antitrust and consumer protection laws to airlines setting of fares because they "relate to ... a price of an air carrier." *In re Korean Air Lines Co., Ltd., Antitrust Litig.*, 567 F. Supp. 2d 1213, 1220 (C.D.Cal. 2008). With simi-

larly broad language, ICCTA preempts state laws with "respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Plaintiffs' challenges to defendants' rates and rate practices under state antitrust, consumer protection and unjust enrichment laws implicate a core concern of the ICCTA – the regulation of "economics and finances of the rail carriage industry," and, just as with the airline industry, such regulation by the states is preempted. *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d at 252.

Plaintiffs nevertheless argue that ICCTA does not preempt state regulation of contract traffic exempted by Congress from STB regulation under another section of the statute, 49 U.S.C. § 10709. Section 10709(c)(1) states that "[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to this part [49 U.S.C. §§ 10101 *et seq.*], and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part [49 U.S.C. §§ 10101 *et seq.*]." 49 U.S.C. § 10709(c)(1). Plaintiffs rely on the "shall not be subject to this part" language for their argument that ICCTA's preemption clause does not apply to any contract traffic, and thus does not apply to any of plaintiffs' claims, all of which involve contract traffic. But plaintiffs have not cited, nor has the Court discovered, any case that interprets the interplay between Sections 10501 and 10709 in the manner plaintiffs suggest, and the Court is not persuaded by plaintiffs' arguments. Read in its **[*40]**

entirety, the sentence makes clear that Congress intended it to mean only that the STB has no regulatory authority over contract claims, not to create an opportunity for state regulation.

To read the "shall not be subject to this part" language as eliminating ICCTA preemption for all contract traffic would be inconsistent with congressional intent. Contract traffic, or otherwise unregulated traffic, accounts for eighty percent of all rail freight traffic. Compl. ¶ 56. Through its enactment of ICCTA, Congress intended that "the Federal scheme of economic regulation and deregulation [of the railroads] ... address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. REP. NO. 104-311, at 95-96 (1995). Interpreting Section 10709(c) as exempting eighty percent of rail traffic from federal preemption opens that traffic up to the risk of pervasive state regulation of "rates" and "practices," and would make it impossible for uniform federal standards to govern railroad operations.

Nor does Section 10709(c)(2)'s references to lawsuits in court, and not before the STB, as the exclusive remedy for alleged breaches of contract by railroads mean that all claims against railroads arising from shipments governed by contract may be brought in federal courts. Under Section 10709(c)(2), courts may rule on breach of contract claims against

railroads, a grant of jurisdiction that is necessary for any industry to function. Ensured enforcement of contracts is a basic premise of our economic system. But plaintiffs are not seeking contractual remedies here. Plaintiffs' desired remedies, through their state antitrust, consumer protection and unjust enrichment claims, are extra-contractual. To allow shippers access to extra-contractual state law remedies against a railroad, simply because they have a contract with the railroad, would gut the purposes of ICCTA.

Plaintiffs' argument concerning ICCTA's evidentiary savings clause, 49 U.S.C. § 10706(a)(3)(B)(ii), is similarly unavailing. The savings clause includes the phrase, "[i]n any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from [certain kinds of evidence]." 49 U.S.C. § 10706(a)(3)(B)(ii). By this section, Congress provided railroads with certain evidentiary protections, but these protections cannot be transformed into a grant of authority for the enforcement of state antitrust laws that are preempted by ICCTA's express preemption clause. Had Congress intended that the entire body of state antitrust law not be preempted by Section 10501(b), it would not have created the exception so tangentially. The Court will not rely on plaintiffs' interpretation of this one clause as adequate counterweight to the plain language in Section 10501(b), as well as the

run of legislative history and of judicial decisions on ICCTA preemption.

For these reasons, the Court concludes that all of plaintiffs' state law claims are preempted by ICCTA and must be dismissed. Because the Court finds the state claims are preempted as a matter of law, it need not reach the issue of whether the named plaintiffs would have standing to bring state laws claims for states in which they do not reside.[5]

[*41]*C. Standing*

The indirect purchaser plaintiffs' remaining claim is a federal antitrust claim for injunctive relief. The Supreme Court's decision in *Illinois Brick* prohibits claims for damages, but not those for injunctive relief, by indirect purchasers under federal antitrust law. *See Illinois Brick v. Illinois*, 431 U.S. 720, 746-47 (1977). *See also Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 592-94 (3d Cir. 1979). Defendants contend that although *Illinois Brick* does not bar plaintiffs' claim for injunctive relief, the claim is barred on other standing grounds and must be dismissed for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants specifically allege that (1) the indirect purchaser plaintiffs fail to allege injury resulting from the conspiracy described in the

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[5] Nor need the Court decide whether a dismissal on preemption grounds is a dismissal for want of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure or for failure to state a claim under Rule 12(b)(6).

complaint, and (2) any resulting injunction would be duplicative of the results that may be achieved by the direct purchaser plaintiffs.

The essential standing question for antitrust claims for injunctive relief is whether the plaintiffs have alleged an antitrust injury – namely a "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977)). Defendants argue that *Associated General Contractors v. Cal. State Council of Carpenters ("AGC")* which established a multi-factor test to determine whether federal antitrust plaintiffs met prudential standing requirements, governs plaintiffs' standing. *See Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983).[6] The indirect purchaser plaintiffs are correct, however, that the "efficient enforcement factors" identified in *AGC* do not apply to claims for injunctive relief. As the Supreme Court stated in *Cargill*:

> [I]n *Associated General Contractors* we considered other factors in addition to antitrust injury to determine whether the petitioner

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[6] The *AGC* factors include: (1) the nature of the plaintiff's alleged injury; (2) the directness of the injury; (3) the risk of duplicative recovery; and (4) the complexity of the apportionment of damages. *Associated General Contractors v. Cal. State Council of Carpenters ("AGC")*, 459 U.S. at 542-44.

> was a proper plaintiff under § 4 [of the Clayton Act for damages].... [H]owever, many of these other factors are not relevant to the standing inquiry under § 16 [of the Clayton Act for an injunction].") .... ['The relevant inquiry under Section 16 is whether plaintiffs have alleged an antitrust injury because] the only remedy available is equitable in nature.... [S]tanding under § 16 raises no threat of multiple lawsuits or duplicative recoveries [once an injunction is imposed].

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 at 110-11 & nn. 5-6.

The complaint alleges that "[p]laintiffs and the Class have suffered injury, and will continue to suffer injury in their business or property, proximately caused by Defendants' unlawful conduct, in that they have paid supra-competitive prices for Rail Fuel Surcharges applied to unregulated rail freight transportation services during **[*42]** the Class Period." Compl. ¶ 120. Unlike in the cases cited by defendants, where the alleged injuries harmed a single competitor, through their allegations identifying defendants' supra-competitive prices, plaintiffs here have alleged an injury to competition itself. *See, e.g., Dial A Car v. Transportation, Inc.*, 884 F. Supp. 584, 588 (D.D.C. 1995), *aff'd in part, rev'd in part* 82 F.3d 484 (D.C. Cir. 1996). This is precisely the sort of injury that the antitrust laws are intended to protect against. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. at 115 ("The antitrust laws ... were enacted for 'the protection of

competition, not *competitors*'") (citations omitted) (emphasis in original); *In re Mercedes-Benz Anti-Trust Litig.*, 157 F. Supp. 2d 355, 364 (D.N.J. 2001) ("Where ... it is alleged that consumers paid a price higher than the price that would have been offered had the dealers been competing, the purpose of the antitrust laws is obviously thwarted.").

Once plaintiffs have alleged an antitrust injury, they must also allege a causal connection between the prohibited behavior and their injury, a requirement common to standing for all plaintiffs. *See Arden Wood, Inc. v. United States Citizenship & Immigration Servs.*, 480 F. Supp. 2d 141, 147 (D.D.C. 2007) ("[s]tanding is an Article III requirement under which the plaintiffs must show, at an 'irreducible constitutional minimum': (1) that they have suffered an injury in fact – the invasion of a legally protected interest; (2) that the injury is fairly traceable to the defendant's conduct (a causal connection); and (3) that a favorable decision on the merits likely will redress the injury.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). *See also Weaver's Cove Energy, LLC v. State of Rhode Island Dep't of Envtl. Mgmt.*, 524 F.3d 1330, 1332-33 (D.C. Cir. 2008).

Defendants argue that the indirect purchasers fail to allege the necessary causal connection between the charged conspiracy and their injury. In fact, however, the indirect purchasers allege:

> Agway has been in the business of shipping farm products to various customs clearance

yards in Chicago, Illinois and Detroit, Michigan, transferring those products to storage facilities, and re-shipping product from these storage facilities to customers of Agway. Agway purchased unregulated freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel surcharges indirectly to Defendants.

* * *

... During the Class Period, Fayus was a California-based wholesale and retail outlet for African and Caribbean food products servicing a diverse clientele ranging from small independent restaurants, institutional food-service establishments as well as supermarkets and grocery stores.

* * *

... At all relevant times during the Class Period, Maroon has been in the business of shipping chemical products to various customs clearance yards ... transferring those products to storage facilities, and re-shipping said products from said storage facilities to customers of Maroon.... Maroon purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants.

* * *

> ... [Plaintiffs] purchased unregulated rail freight transportation indirectly from [*43] one or more of the Defendants during the Class Period, and during the Class Period one or more of the Defendants assessed Rail Fuel Surcharges on Plaintiffs in connection with that unregulated rail freight transportation. The prices Plaintiffs paid to Defendants for unregulated rail freight transportation services on which Rail Fuel Surcharges were imposed were greater than the prices Plaintiffs would have paid absent the conspiracy alleged herein.

Compl. ¶¶ 28-31. Defendants' challenges to these allegations are essentially that plaintiffs purchased the rail freight services *indirectly*, a fact which, as discussed above, does not, on its own, invalidate their claims for injunctive relief.[7] Plaintiffs have alleged an antitrust injury caused by these asserted antitrust violations which their desired injunction may ameliorate; and they have alleged adequate factual detail to trace the injury to defendants' allegedly collusive activities. The Court finds that they have

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[7] Defendants' reliance on *O.K. Sand & Gravel v. Martin Marietta Technologies* for the required amount of factual detail that must be pled for antitrust standing is misplaced. The court there considered whether the plaintiff had produced enough evidence *at trial* to support the verdict, not what a plaintiff must plead to make the initial showing of standing. *See O.K. Sand & Gravel v. Martin Marietta Technologies*, 36 F.3d 565, 573 (7th Cir. 1994).

adequately alleged both antitrust injury and standing.

Defendants further argue that regardless of whether plaintiffs would otherwise have standing, the Court should dismiss their federal claims on equitable grounds. Doing so, according to defendants, would eliminate the possibility that the indirect purchaser plaintiffs' desired injunction would be duplicative of the injunction that the direct purchaser plaintiffs seek, would protect defendants against the payment of attorneys' fees to two sets of lawyers and would promote judicial economy. The Court recognizes the possibility that allowing both the direct and indirect purchasers to proceed with their cases may result in some inefficiency. Because the outcome of the direct purchasers' case is not yet determined, however, it is not yet known whether allowing the indirect purchasers to proceed will actually be inefficient. There is no assurance at this point that the direct purchasers will obtain an injunction against defendants. And none of the cases cited by defendants supports dismissing plaintiffs' claims before the potentially duplicative injunction is in place. Furthermore, it is possible that a settlement agreement could be reached between defendants and the putative direct purchaser class, a realistic possibility given that the direct purchasers' claims for money damages are viable. Even if they do not settle before trial, the two putative classes have different attorneys and may pursue different strategies during discovery or at trial, all of which may result in different outcomes. In short, the Court

finds that it would be premature to dismiss the indirect purchasers' federal claim on equitable grounds at this point.

V. CONCLUSION

For these reasons, the Court will grant defendant's motion to dismiss in part and will deny it in part. Plaintiffs' state law claims will be dismissed. Their federal antitrust claim for injunctive relief will not be dismissed. A separate Order consistent with this Opinion shall issue this same day.

SO ORDERED.

Date: 12/31/08

/s/
Paul L. Friedman
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	MDL Docket No. 1869 Misc. No. 07-489 (PLF)
This document relates to: INDIRECT DIRECT PURCHASER PLAINTIFFS	

ORDER

This matter is before the Court on defendants' motion to dismiss the indirect purchaser plaintiffs' amended class action complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure and for lack of subject matter jurisdiction under Rule 12(b)(1). Upon careful consideration of the parties' arguments in their papers and the oral arguments presented by counsel before the Court on October 10, 2008, and for the reasons explained in the Court's separate Opinion issued this same day, the Court concludes that the motion to dismiss must be granted as to the indirect purchaser plaintiffs' state law claims and must be denied as to their fed-

eral antitrust claim for injunctive relief. Accordingly it is hereby

ORDERED that defendants' motion to dismiss [107] is GRANTED in part and DENIED in part; and it is

FURTHER ORDERED that all of the indirect purchaser plaintiffs' state law claims are DISMISSED. The case will proceed with respect to plaintiffs' federal antitrust claim for injunctive relief.

SO ORDERED.

Dated: 12/31/08

/s/
PAUL L. FRIEDMAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	MDL Docket No. 1869 Misc. No. 07-489 (PLF)
This document relates to: INDIRECT PURCHASER PLAINTIFFS	

ORDER

ORDER GRANTING INDIRECT PURCHASER PLAINTIFFS' UNOPPOSED MOTION FOR ENTRY OF FINAL JUDGMENT OF COUNTS II-IV AND FOR A STAY OF THE PROCEEDINGS WITH RESPECT TO COUNT I

Indirect Purchaser Plaintiffs Agway Liquidating Trust, Fayus Enterprises, and Maroon Incorporated having moved for entry of final judgment pursuant to Fed. R. Civ. P. 54(b) of the Court's December 31, 2008 dismissal of Counts II-IV of the Consolidated Class Action Complaint, and to stay proceedings on Count I pending the resolution of Plaintiffs' appeal of Counts II-IV, and there being no just reason for delay and for other good cause shown, it is hereby ORDERED, that:

1. Final judgment is entered on Counts II, III, and IV; and

2. Proceedings on Count I are stayed pending a decision on an appeal from the judgment entered on Counts II, III, and IV.

Dated: 1/16/09

/s/
Hon. Paul L. Friedman
United States
District Court Judge

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 49, United States Code: Transportation.
Subtitle IV: Interstate Transportation.
Part A: Rail.

Section 10101:

In regulating the railroad industry, it is the policy of the United States Government –

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

. . .

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense . . . .

Section 10102:

In this part –

. . .

(5) "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

. . .

(9) "transportation" includes –

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

Section 10501(b):

The jurisdiction of the Board over –

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Section 10706(a)(2) & (3):

> (2)(A) A rail carrier providing transportation subject to the jurisdiction of the Board under this part that is a party to an agreement of at least 2 rail carriers that relates to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them, shall apply to the Board for approval of that agreement

under this subsection. The Board shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of its approval. If the Board approves the agreement, it may be made and carried out under its terms and under the conditions required by the Board, and the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9) and the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement. However, the Board may not approve or continue approval of an agreement when the conditions required by it are not met or if it does not receive a verified statement under subparagraph (B) of this paragraph.

(B) The Board may approve an agreement under subparagraph (A) of this paragraph only when the rail carriers applying for approval file a verified statement with the Board. Each statement must specify for each rail carrier that is a party to the agreement –

(i) the name of the carrier;

(ii) the mailing address and telephone number of its headquarter's office; and

(iii) the names of each of its affiliates and the names, addresses, and affiliates of each of its officers and directors and of each person, together with an affiliate, owning or controlling any debt, equity or security interest in it having a value of at least $1,000,000.

(3)(A) An organization established or continued under an agreement approved under this subsection shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed. Such an organization may not –

(i) permit a rail carrier to discuss, to participate in agreements related to, or to vote on single-line rates proposed by another rail carrier, except that for purposes of general rate increases and broad changes in rates, classifications, rules, and practices only, if the Board finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part;

(ii) permit a rail carrier to discuss, to participate in agreements related to, or to vote on rates related to a particular interline movement unless

that rail carrier practicably participates in the movement; or

(iii) if there are interline movements over two or more routes between the same end points, permit a carrier to discuss, to participate in agreements related to, or to vote on rates except with a carrier which forms part of a particular single route. If the Board finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part.

(B)(i) In any proceeding in which a party alleges that a rail carrier voted or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a

party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such rail carrier and one or more other rail carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement –

(I) was in accordance with an agreement approved under paragraph (2) of this subsection; or

(II) concerned an interline movement of the rail carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of subclause (I) or (II) are satisfied before allowing the introduction of any such evidence.

(C) An organization described in subparagraph (A) of this paragraph shall provide that transcripts or sound recordings be made of all meetings, that records of votes be made, and that such transcripts or recordings and voting records be submitted to the Board and made available to

other Federal agencies in connection with their statutory responsibilities over rate bureaus, except that such material shall be kept confidential and shall not be subject to disclosure under section 552 of title 5, United States Code.

Section 10709(a), (b) & (c):

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28, United States Code.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	Civil Docket No.1:07-mc-00489 PLF
	MDL 1869
This Document Relates to:	**INDIRECT PURCHASER PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT**
ALL CASES	**DEMAND FOR JURY TRIAL**

Plaintiffs Agway Liquidating Trust, Fayus Enterprises, and Maroon Incorporated, individually and on behalf of a class of all those similarly situated, bring this action for damages and injunctive relief under federal antitrust law and state antitrust and consumer protection law and alleges as follows:

NATURE OF THE ACTION

1. This is an antitrust class action charging four United States-based Class I railroads, Union Pacific Railroad Company, BNSF Railway Company, CSX Transportation, Inc., and Norfolk Southern Railway Company (collectively, "Defendants") with price fixing in violation of Section 1 of the Sherman Act as well as in violation of state antitrust laws and state consumer protection laws. Plaintiffs bring this action on behalf of themselves and an alleged class of indirect purchasers who purchased unregulated rail freight transportation services from Defendants from July 1, 2003 to the present (the "Class Period," which will also include the period from the date of this filing to the date of class notice) and who were assessed a rail fuel surcharge ("Rail Fuel Surcharge") for the agreed-upon transportation. As used herein, the term "unregulated" refers to rail freight transportation services where the rates are set by private contracts or through other means exempt from rate regulation under federal law.

2 Defendants conspired to fix, raise, maintain, and/or stabilize prices of rail freight transportation services sold in the United States

through use of Rail Fuel Surcharges added to customers' bills. A Rail Fuel Surcharge is a separately identified fee that is charged by Defendants, purportedly to compensate for increases in the cost of fuel, for the agreed-upon transportation.

3. Defendants collectively control over 90 percent of the rail freight traffic in the United States. According to an economic analysis on Railroad Fuel Surcharge practices commissioned by the American Chemistry Council released in September 2007, Defendants overcharged rail shippers by more than $6.5 Billion between 2005 and the first quarter of 2007.

4. In the early 2000s, the Defendants sought to increase their revenues by raising prices. However, unlike in the past era of full regulation of the railroad industry, when the railroads could have applied to the Interstate Commerce Commission (the "ICC") for across-the-board rate increases, the railroads now no longer could do so as a result of deregulation that began with the Staggers Rail Act of 1980 in the early 1980s. Given deregulation, the only practicable way the railroads now could increase prices across-the-board was through the mechanism of a uniform surcharge applied to as many purchasers of rail freight transportation services as possible.

5. Defendants BNSF Railway Company, Union Pacific Railroad Company, CSX Transportation, Inc., and Norfolk Southern Railway Company – which together control about 90% of rail freight

traffic in the United States – conspired in 2003 to use an artificially high surcharge, purportedly to cover fuel costs, as the means to raise rates across the board, and thereby increase profits. But this plan faced a significant hurdle: as of 2003, the great majority of rail freight transportation agreements included rate escalation provisions that weighted a variety of cost factors, including fuel, based on an index called the "AII" or "All Inclusive Index," published by the railroad trade organization known as the Association of American Railroads (the "AAR"). The AII (and a related index called the Rail Cost Adjustment Factor (the "RCAF") that was based on the AII) already permitted full recovery by the railroads of actual fuel cost increases, no matter how large. By weighting different cost factors, the AII and related RCAF accounted accurately for the impact of particular cost increases (e.g., for fuel). James R. Young, the President of UP, acknowledged during an October 2004 earning call that the RCAF "looks at actual costs through the industry."

6. To overcome this obstacle, Defendants devised and embarked on a scheme to remove fuel from the AII, so that a separate "fuel surcharge" could then be applied as a percentage against the total cost of the freight transportation. This permitted these major railroads to achieve their desired, and mutually agreed, result: an effective percentage rate increase that could be broadly applied to rail freight customers.

7. Defendants executed their conspiracy through a number of collective actions as described below.

8. In July 2003, the two major western railroads, Defendants BNSF Railway Company and the Union Pacific Railroad Company, both started charging the exact same fuel surcharge. Up until this time, Rail Fuel Surcharges were only intermittently applied, and the Defendants had different Rail Fuel Surcharge rates, reflecting, among other things, that each Defendant had different fuel costs. In July 2003, however, BNSF Railway Company and Union Pacific Railroad Company began to move in lockstep, each now basing their fuel surcharge on the U.S. Department of Energy (DOE) On-Highway Diesel Fuel Price Index (the "HDF Index"). At this time, the HDF Index was at a higher rate than the West Texas Intermediate Crude Oil Index (the "WTI Index"), which Union Pacific previously had been utilizing. Defendants BNSF Railway Company and Union Pacific Railroad Company have remained in lockstep, using the HDF Index, through the present.

9. These actions by defendants BNSF Railway Company and Union Pacific Railroad Company, however, were not sufficient to permit widespread use of Rail Fuel Surcharges as a revenue-raising mechanism because most private contracts still had cost escalation provisions that included fuel costs as a factor, meaning that a separate Rail Fuel Surcharge could not also readily be used.

10. In late 2003, Defendants solved this problem through collective action. Defendants caused the AAR, a trade organization that is controlled and dominated by Defendants, to develop and publish a new index with fuel removed as an element of cost escalation.

11. In contrast, the then-existing standard cost escalation indices – the AAR's All-Inclusive Index (the "AII"), and RCAF based on the AII – each accounted for a variety of cost factors, including fuel. Furthermore, the RCAF and AII weighted these different factors so that each index would account accurately for the impact of particular cost increases (e.g., for fuel). Thus, prior to late 2003, any actual increase or decrease in fuel costs, no matter how large, could be captured in the RCAF and AII. In other words, *there was no need to remove fuel from the existing indices in order to recover any fuel cost increases*.

12. Pursuant to Defendants' agreement and collective action, the AAR announced in December 2003 announced that a new index, the All Inclusive Index Less Fuel ("AII-LF"), was being established. This new index was unlike the RCAF and AII in that the new index excluded fuel. Also unlike the RCAF, the new AII-LF was not subject to review by the Surface Transportation Board ("STB"). The AAR's official publication, entitled *AAR Railroad Cost Indexes* announced: "This issue of AAR Railroad Cost Indexes inaugurates a new index: the All-Inclusive Index Less Fuel. This index is calculated using the same components and methods as the All-

Inclusive Index uses for the Rail Cost Adjustment Factor, *with the exception of the exclusion of the fuel component*." (emphasis supplied). This announcement, and the underlying removal of fuel from the AII and RCAF, were the *collective action* of the Defendants, which dominate and control the AAR. Moreover, the AAR could not have taken these steps without collective action by the Defendants. As an illustration, senior officer of Defendant BNSF admitted in 2004 that BNSF Chairman, President and CEO Matthew K. Rose "led the charge on" the AAR's adoption of the new index without a fuel cost component.

13. Importantly, the AAR had never before established a cost escalation index without a fuel cost component. In a July 2007 interview, Defendant UP's James R. Young ("Young") acknowledged the new Rail Fuel Surcharges, as applied to rail freight transportation services, were "really unique to the railroad industry. Three, four years ago they were really non-existent."

14. Through Defendants' collective action, the AAR's implementation of this new index in December 2003 provided Defendants the ability to apply, and Defendants, in fact, did apply, Rail Fuel Surcharges more broadly than before, since fuel would no longer automatically be covered by standard rate escalation clauses.

15. Defendant UP's Young admitted, during an October 2004 earnings call, that UP was now "getting away from the RCAF" and "putting in the

specific fuel recovery mechanism in areas that historically would have used RCAF." According to Young, by July 2007, approximately "80 to 90 percent" of UP's business had "some kind of fuel surcharge mechanism that gets passed on to the customer."

16. Almost immediately after the AAR announcement, the two major eastern railroads – Defendants CSX Transportation, Inc. and Norfolk Southern Railway, Inc., each of which had different fuel costs – in early 2004 made the identical decision that they would now use the same fuel surcharge rates and that these surcharges would be based on the WTI Index (which, in early 2004, was at a higher rate than the HDF Index that the Western Railroads simultaneously started to use in July 2003). As with the Western Railroads, the Eastern Railroads previously had different fuel surcharges (reflecting, among other things, their different fuel costs). This identical decision by the Eastern Railroads, coming on the heels of the Defendants' collective action in late 2003 to remove fuel from the AII and RCAF, eliminates any reasonable possibility that the Eastern Railroads decided independently to use the WTI Index in early 2004.

17. Like the Western Railroads, the Eastern Railroads remained in complete lockstep, applying the exact same fuel surcharges, through at least June 2007.

18. With the AII-LF in place, the Defendants were able to use the Rail Fuel Surcharges as a reve-

nue-generating, rather than cost-recovery, mechanism because the Defendants each applied the fuel surcharge the same way: as a percentage multiplier of the *total* base rate for the rail freight transportation. That is, while the fuel factor in the AII and RCAF had been "weighted" to reflect the relative impact of fuel costs as compared to other cost factors, when fuel was removed from the new AII-LF index, the Defendants applied the percentage increase in fuel costs triggered by the applicable index to the *entire* cost of the freight transport. Thus, if the percentage increase triggered by the applicable fuel index was, for example, 15%, then by applying the fuel surcharge the Defendants would raise the entire cost of the freight transport by 15% – even though fuel accounted for only a portion of the total rail transport cost (which is what the AII and RCAF had been designed to reflect).

19. This collective approach resulted in billions of dollars of additional profits for Defendants.

20. Defendants were able to maintain their conspiracy by uniformly computing the surcharges as a percentage of the rail freight transport base rate, and by agreeing upon common trigger points for adjusting the percentages monthly. Defendants also published their Rail Fuel Surcharges on their websites to facilitate coordination and the detection of any deviation from collusive pricing.

21. Defendants also took other collective action to enforce the conspiracy and make it effective. For example, they largely stopped entering into long-

term contracts and entered instead into contracts for periods of approximately 30 days, or with 30-day cancellation provisions, thereby making it easier to implement the fuel surcharges, which were adjusted monthly. Defendants also limited the previously prevailing practice, in circumstances where more than one railroad was involved in long-distance freight transport, of sending a customer a single bill for the entire transport. Instead, Defendants increasingly switched to having each railroad on a multi-railroad trip send a separate bill (and thus could separately impose its own fuel surcharge). This facilitated each Defendant recouping its share of the supra-competitive profits. Such a switch to separate invoicing on multi-railroad trips could be accomplished only through collective action of the Defendants. Defendants also began refusing to negotiate discounts on rail freight rates – even in circumstances where individual railroads had previously been willing to do so.

22. The collective actions of Defendants, including effectively removing fuel from the AII and RCAF by creating the new AII-LF, and moving into lockstep on fuel surcharges, cannot be explained as the result of routine market conduct to collect increasing fuel costs or even to do so more efficiently. The fuel cost component in the AII and RCAF was fully effective for recovering *actual* fuel costs. Indeed, the AII had been designed to ensure that fuel and other cost increases could be recovered, regardless of the size of the fuel cost increase. Rather, by creating a new cost index without fuel (the AII-LF), and

through their other collective actions, Defendants devised and implemented a means to impose an across-the-board rate increase for rail freight transportation services. Instead of competing on fuel prices given their differing fuel costs, Defendants collectively created the type of across-the-board rate increase that they had been able to ask the now-disbanded ICC to impose during the pre-1980 period of complete rate regulation and then lawful collective railroad pricing activities.

23. In a January 2007, the STB, which has authority over rate-regulated traffic that is not within the class alleged here, found that the rail fuel surcharges, as applied to STB-regulated freight traffic, were "unreasonable" and did not relate to the railroads' actual cost of fuel. In its ruling, the STB explained that:

> After considering all of the comments, we affirm the preliminary conclusion in the August decision that it is an unreasonable practice to compute fuel surcharges as a percentage of the base rates. Because railroads rely on differential pricing, under which rates are dependent on factors other than costs, a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the surcharge is applied, cannot fairly be described as merely a cost recovery mechanism. Rather, a fuel surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the

> actual increase in fuel costs for handling the particular traffic to which the surcharge is applied. Two shippers may have traffic with identical fuel costs, but if one starts out with a higher base rate (because, for example, it has fewer transportation alternatives), it will pay dramatically more in fuel surcharges.

See Surface Transportation Board Decision, Rail Fuel Surcharges (STB Ex Parte No. 661, January 26, 2007) at 6; *see also id.* at 7 ("the term 'fuel surcharge' most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. If it is used instead as a broader revenue enhancement measure, it is mislabeled.").

24. The STB further stated that *"[u]nder 49 U.S.C. § 10709, we have no authority to regulate rail rates and services that are governed by a contract."* *Id.* (emphasis supplied).

25. Each of the Defendants has disclosed that it has received a state grand jury subpoena and/or state grand jury inquiry concerning the Rail Fuel Surcharges. In an SEC Form 10-K dated February 22, 2008, Defendant CSX stated that "[i]n July 2007, CSXT received a grand jury subpoena from the New Jersey Office of the Attorney General seeking information related to the same fuel surcharges that are the subject of the purported class actions. It is possible that additional federal or state agencies could initiate investigations into similar matters." (CSX Corp., 10-K, February 22, 2008 at 99). In an SEC Form 10-K dated February 15, 2008, Defendant

BNSF stated that "[t]he Company is also responding to a state grand jury subpoena requesting production of information related to fuel surcharges." (BNSF Railway Company, 10-K, February 15, 2008 at 10). In an SEC Form 10-K dated February 15, 2008, Defendant Norfolk Southern stated that "NS received a subpoena from a state grand jury on July 13, 2007, requesting documents and materials relating to the setting of fuel surcharges. NS is cooperating with the state in its investigation." (Norfolk Southern, 10-K, February 15, 2008 at K16). And in an SEC Form 10-K dated February 28, 2008, Defendant UP disclosed that "the Attorney General of a state outside our service area issued a grand jury subpoena to us requesting documents pertaining to our fuel surcharge program. We met with representatives of this Attorney General's office, and we plan to have additional meetings in the future in an effort to resolve that office's interest in this matter." (Union Pacific Corp., 10-K, February 28, 2008 at 15).

26. As a direct and proximate result of the price fixing conspiracy alleged herein, Defendants have restrained competition in the market for rate-unregulated rail freight transportation services and injured Plaintiffs and each Class member in their business and property. Plaintiffs and the members of the Class each have paid a higher price for unregulated rail freight transportation than they would have paid absent the concerted unlawful activity alleged herein.

27. Plaintiffs seek damages on behalf of themselves and the Class for Rail Fuel Surcharges imposed on rail freight shipments made under private transportation contracts and through other means exempt from rate regulation under federal law. Plaintiffs do not seek, on behalf of themselves or the Class, damages or relief arising from Rail Fuel Surcharges imposed on rate-regulated freight transportation.

PARTIES

Plaintiffs

28. Plaintiff Agway Liquidating Trust ("Agway") was established by order of the United States Bankruptcy Court for the Northern District of New York, dated April 28, 2004 confirming the Debtor's Second Amended Joint Plan of Liquidation, and is authorized to prosecute the claims set forth herein. D. Clark Ogle was appointed the Trustee of the Liquidating Trust by order dated April 28, 2004, and has directed the Liquidating Trust to prosecute these claims through its counsel. Agway was an agricultural cooperative formed in 1964 that is headquartered in DeWitt, New York. On October 12, 2002, Agway and several of its wholly-owned subsidiaries filed for bankruptcy protection pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 1101 et seq. On April 28, 2004, Agway's Plan was confirmed, and liquidation of the estate currently continues under the Trustee. Agway has been in the business of shipping farm products to various customs clearance yards in Chicago, Illinois

and Detroit, Michigan, transferring those products to storage facilities, and re-shipping product from these storage facilities to customers of Agway. Agway purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants.

29. Plaintiff Fayus Enterprises ("Fayus") is a corporation organized under the laws of the State of California, with its principal place of business at 1720 N. Market Boulevard, Suite 11, Sacramento, CA 95834. During the Class Period, Fayus was a California-based wholesale and retail outlet for African and Caribbean food products servicing a diverse clientele ranging from small independent restaurants, institutional foodservice establishments as well as supermarkets and grocery stores. Fayus purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants.

30. Plaintiff Maroon Incorporated ("Maroon") is an Ohio corporation with its principal office at 1390 Jaycox Road, Avon, Ohio 44011, and a secondary office at 7750 Industrial Drive, Forest Park, Illinois 60130. At all relevant times during the Class Period, Maroon has been in the business of shipping chemical products to various customs clearance yards in Chicago, Illinois and Detroit, Michigan, transferring those products to storage facilities, and re-shipping said products from said storage facilities to customers of Maroon. Maroon also has distribu-

tion facilities located in Minneapolis, Minnesota; Cincinnati, Ohio; Grand Rapids, Michigan; Chicago, Illinois; Cleveland, Ohio; Detroit, Michigan; Louisville, Kentucky; Milwaukee, Wisconsin; and Newark, Delaware. Maroon purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants. By reason of the conspiracy alleged herein, and the imposition by Defendants of Rail Fuel Surcharges, Maroon paid prices for rail freight transportation services which were greater than the prices which would have been available in a competitive market without the conspiracy. Maroon has therefore been injured in its business and property by reason of Defendants' violations of the federal and state antitrust laws, state consumer protection and unfair competition laws, and state common law, as more fully set forth herein.

31. Plaintiffs Agway, Fayus and Maroon (collectively, "Plaintiffs") purchased unregulated rail freight transportation indirectly from one or more of the Defendants during the Class Period, and during the Class Period one or more of the Defendants assessed Rail Fuel Surcharges on Plaintiffs in connection with that unregulated rail freight transportation. The prices Plaintiffs paid to Defendants for unregulated rail freight transportation services on which Rail Fuel Surcharges were imposed were greater than the prices Plaintiffs would have paid absent the conspiracy alleged herein. Plaintiffs have therefore been injured in its business

and property by reason of Defendants' antitrust and consumer protection violations. Plaintiffs assert its claims on behalf of themselves and all indirect purchasers of unregulated rail freight transportation services from one or more of the Defendants, and as to which Defendants imposed Rail Fuel Surcharges, during the Class Period.

Defendants

32. Defendant CSX Transportation, Inc. ("CSX") has its principal place of business at 500 Water St., Jacksonville, Florida 32202. CSX is a major freight railroad operating primarily in the eastern United States and Canada. CSX links commercial markets in 23 states, the District of Columbia, and certain Canadian provinces. CSX has railway lines throughout the eastern United States.

33. Defendant Norfolk Southern Railway Company ("NS") has its principal place of business at Three Commercial Place, Norfolk, Virginia 23510. NS is a major freight railroad operating primarily in the eastern United States. NS serves all major eastern ports and connects with rail partners in the West, linking customers to markets around the world.

34. Defendant BNSF Railway Company ("BNSF") has its principal place of business at 2650 Lou Menk Drive, Fort Worth, Texas 76131. BNSF is a wholly owned subsidiary of the Burlington Northern Santa Fe Corporations, the holding company formed by the September 22, *1995* merger of Burlington Northern and Santa Fe Corporation. BNSF

is the second largest railroad network in North America and operates 32,000 route miles of railroad. BNSF has offices and rail lines throughout the western United States, extending into the Southeastern states.

35. Defendant Union Pacific Railroad Company ("UP") has its principal place of business at 1400 Douglas Street, Omaha, Nebraska 68179. UP is the largest freight railroad in the United States. UP serves primarily the western two-thirds of the United States and maintains coordinated schedules with other rail carriers to handle freight to and from other parts of the country (including District of Columbia).

JURISDICTION AND VENUE

36. This Court's jurisdiction is founded on 15 U.S.C. §§ 15 and 26 and 28 U.S.C. §§ 1331 and 1337.

37. This Court also has diversity jurisdiction over the claims herein pursuant to 28 U.S.C. §§ 1332(d)(2) and (6) because one or more members of the putative class defined herein are citizens of a State different from one or more defendants and the aggregate amount in controversy exceeds five million dollars ($5,000,000), exclusive of interest and costs. This is a class action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interest and costs.

38. Venue is proper in this district pursuant to Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26) and 28 U.S.C. § 1391. Defendants maintain offices, transact business, have agents and

are found within this District; thousands of Class members are located in this District; a substantial part of the events giving rise to the claims occurred in this District; and Defendants regularly conduct business in interstate commerce that is carried out in part in this District.

39. Venue is also proper because this action has been transferred to this District by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407(a). Thus no other forum would be more convenient for the parties and witnesses to litigate this case.

40. This Court has jurisdiction of the person of each Defendant. Each Defendant (a) transacted business within this District; (b) directly or indirectly sold or delivered rail transportation services in this District; (c) has substantial contacts with this District; and (d) engaged in an illegal price-fixing conspiracy that had the intended effect of causing injury to persons and entities found in or doing business in this District.

EFFECTS ON INTERSTATE COMMERCE

41. The AAR Policy and Economics Department reported that railroad total operating revenue in the United States was over $52 billion in 2006.

42. Defendants' activities within the Class Period were within the flow of interstate and international commerce, as they engaged in rail freight shipments to customers and shippers throughout the United States. Each Defendant, as well as their co-conspirators, used instrumentalities

of interstate and/or foreign commerce to sell rail freight transportation services.

43. Defendants accounted for more than 90 percent of all rail freight shipments within the United States during the Class Period. The activities of Defendants and their co-conspirators have had a direct, substantial and foreseeable effect on interstate and international commerce.

44. Defendants' conspiracy further affected commerce in each of the states identified herein because they, directly or through their agents, engaged in activities affecting each state. Defendants have purposely availed themselves of the laws of each of the states identified herein in connection with their activities relating to the provision of rail freight transportation services. Defendants provided rail freight transportation services in each of the states identified herein, thereby purposefully profiting from access to indirect purchasers in each state. Defendants also contracted to supply rail freight transportation services in each such state. As a result of the activities described herein, Defendants:

(a) Caused tortious damage to the residents of the states identified herein;

(b) Caused tortious damage in each of the states identified herein by acts or omissions committed outside each such state by regularly doing or soliciting business in each such state;

(c) Engaged in persistent courses of conduct within each such state and/or

derived substantial revenue from the provision of rail freight transportation services in each such state; and

(d) Committed acts or omissions that they knew or should have known would cause damage (and did, in fact, cause damage) in each such state while regularly doing or soliciting business in each such state, engaging in other persistent courses of conduct in each such state and/or deriving substantial revenue from the marketing and provision of rail freight transportation services (and related services) in each such state.

45. The conspiracy described herein affected adversely every person, including consumers, in each of states identified in this Complaint who indirectly bought Defendants' rail freight transportation services. Defendants' conspiracy has lasted over four years and resulted in a collective adverse monetary effect on indirect purchasers in each state identified herein.

46. Indirect prices of rail freight transportation services in each state can be manipulated by conspirators within that state, outside of it, or both. Without enforcing the antitrust and/or consumer protection laws of each of the states identified herein, firms that break the law will go unpunished. Defendants knew that commerce in each of the

states identified herein would have to be adversely affected in order to implement their conspiracy.

CLASS ACTION ALLEGATIONS

47. Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated, under Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. The "Class" is defined as:

> All indirect purchasers of rail freight transportation services from Defendants, through use of private railroad-shipper contracts or through other means exempt from rate regulation under federal law, as to which Defendants assessed a Rail Fuel Surcharge, from July 1, 2003 to the present (the "Class Period"). Excluded from the Class are Defendants, any subsidiaries or affiliates of Defendants, and any of Defendants' co-conspirators, whether or not named as a Defendant herein and all federal governmental entities.[1]

48. The Class is so numerous, and its members so geographically dispersed, that joinder of all class members would be impracticable. Plaintiffs currently lack precise information as to the size of the Class, but believe that the Class is comprised of thousands of members whose identities can readily

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[1] Plaintiffs reserve the right to amend the class definition to add additional subclasses and additional plaintiffs at the time of the motion for class certification.

be ascertained from the books and records of Defendants.

49. Plaintiffs' claims are typical of those of the Class, all of whose members have been damaged because they paid supra-competitive prices for unregulated rail freight transportation services during the Class Period by reason of Defendants' anticompetitive activities in violation of federal and state law as set forth herein.

50. Plaintiffs will fairly and adequately protect the interest of Class members. Plaintiffs have retained competent counsel with experience in class action and antitrust litigation.

51. Common questions of law and fact exist as to all members of the Class, and these questions predominate over any questions affecting solely individual Class members. Among the common questions are:

- whether Defendants conspired, agreed and/or combined with themselves or others for the purpose of and with the effect of raising, fixing or maintaining the price of Rail Fuel Surcharges applied to unregulated rail freight transportation services purchased by the Class;

- whether Defendants' activities violated the federal and/or state antitrust laws as set forth herein;

- whether Defendants' activities violated state unfair competition and/or consumer protection laws as set forth herein;
- whether Defendants' activities violated state common law as set forth herein;
- whether Defendants' activities caused injury to the business and property of Plaintiffs and the Class; and
- what is the proper measure of any damages to be awarded to Plaintiffs and the Class.

52. A class action is superior to other available methods for the fair and efficient adjudication of this matter. Prosecution of separate actions by individual Class members would unduly burden the courts and risk inconsistent adjudications of common questions of law and fact. A class action would achieve economies of time and expense, uniform results, and procedural fairness to all parties.

53. The amounts at stake for Class members are not great enough to merit individual actions against Defendants, although the aggregate amount is substantial. No Class member thus has a pragmatic interest in individually controlling the prosecution of this case. Plaintiffs foresee no difficulty in the management of this action as a class action.

DEREGULATION OF THE RAILROAD INDUSTRY

54. Congress deregulated the railroad industry with passage of the Staggers Rail Act of 1980 ("Staggers Act"). This landmark legislation marked a dramatic change in the evolution of U.S. railroads. After decades of regulatory control over virtually every aspect of their economic operations, railroads were free to set market rates for rail transportation.

55. Prior to the Staggers Act, railroads for freight transport generally would only charge the published tariff rates filed by the railroads with the ICC. During that era of full regulation, railroads could apply to the ICC for across-the-board rate increases, which could lawfully be implemented on a collective basis.

56. Today, by contrast, 80 percent or more of all rail shipments are exempt from rate regulation or move under private transportation contracts, the rates in which are not regulated. For all of this rate-unregulated traffic, the railroads cannot turn to some agency – like the old ICC – to obtain across-the-board increases in freight rates, nor can the railroads lawfully collude to set those rates.

57. Since 1980, the number of Class I railroads has declined dramatically, from 35 at the time of passage of the Staggers Act to just seven today (two of which are owned by Canadian entities).[2] The

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[2] A Class I railroad is one having revenues in excess of $250 million in 1991 dollars ($319.3 million in 2005 dollars). There

railroad industry is now highly concentrated: four of these railroads – Defendants BNSF, UP, CSX and NS – operate more than 90 percent of all railroad track in the U.S. and in 2006 accounted for approximately $50 billion in total annual revenue. Given the high fixed costs in the railroad industry and its significant barriers to entry (i.e., the need to invest in a vast network of tracks, stations, yards, and switching facilities that take decades to develop, and require onerous regulatory and environmental reviews and approval), there is only a fringe or niche market of smaller carriers, and the competition offered by these small carriers is negligible.

58. Although the reason for deregulation of the railroad industry was to promote competition and lower freight rates, it is now clear that the opposite has come true – railroads are collectively charging shippers supracompetitive rates.

THE DEFENDANTS INTRODUCE FUEL SURCHARGES

59. By the early 2000s, the industry had consolidated to the point where further mergers were unlikely if not impossible. In response to the proposed Burlington Northern Santa Fe and Canadian National Railway Co. merger, the STB, which

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are currently seven Class I railroads operating in the United States: (1) BNSF; (2) UP; (3) CSX; (4) NS, (5) KCS; (6) Soo Line Railroad Co.; and (7) Grand Trunk Corporation. The Soo Line Railroad is owned by Canadian Pacific Railway. The Grand Trunk Corporation is owned by the Canadian National Railway

succeeded the ICC, introduced a moratorium on new mergers and then promulgated more stringent standards for merger review. At the same time, railroads were experiencing surging freight demand and tight capacity.

60. In this environment, Defendants lacked the legal means to implement a traditional across-the-board price increase. As a result of deregulation, Defendants could no longer ask the ICC or its successor, the STB, for across-the-board rate increases. Thus, the only practicable way to increase prices across-the-board and increase revenues in the short term is through the mechanism of a uniform surcharge to as many customers as possible. Under the guise of rising fuel prices, Defendants colluded to create and implement the Rail Fuel Surcharges as a means to implement what effectively operate as across-the-board rate increases.

61. Since passage of the Staggers Act in 1980, railroads had increasingly entered into private transportation contracts with cost escalation provisions often tied to the AII and the RCAF (which is based on the AII). Both the RCAF and the AII were published by the AAR, and both Indexes included fuel costs as a factor. The AII and RCAF weighted a number of cost factors – labor, fuel, materials & supplies, equipment rents, depreciation, interest, and other expenses – so that the actual impact of particular cost increases (e.g., for fuel) would be reflected in the index. Any actual increase in fuel costs, no matter how large, would be captured in the

AII and RCAF. The Indexes, and the weighted factors within them, were designed for this purpose.

62. Defendants, in 2003, seized upon fuel as the means to create the type of across the board rate increase for which these railroads, in the era of deregulation, could no longer apply to a regulatory body. As alleged above, the Defendants embarked upon and implemented an agreed plan to remove fuel from the AII (and thus from the RCAF based on the AII), and thereby permit separate "fuel surcharges" to be widely applied. With fuel no longer weighted against other cost factors, the separate "fuel surcharges" could be used simply to raise total freight prices by a given percentage – and that is precisely what these four railroads proceeded to do.

63. By way of background, prior to 2003, at least some of the Defendants imposed so-called "fuel surcharges" on private rail freight transportation, but (a) these fuel surcharges were applied only in isolated instances, and (b) each of the Defendants had different fuel surcharge rates, reflecting, *inter alia*, the differing fuel costs of each railroad. At that time, such surcharges were the exception, with the AII and RCAF indexes widely used to capture fuel costs and other costs. All of that changed in 2003, however, when the Defendants took a series of coordinated actions to switch to a new system that would allow the widespread use of Rail Fuel Surcharges as a revenue enhancement mechanism.

64. From at least the Spring of 2003 and continuing through the present, the top executives of

each of the Defendants met regularly to discuss their industry. For example, at biannual meetings of the National Freight Transportation Association ("NFTA"), executives of the Defendants met to consider and discuss developments in the railroad industry. Defendants' top executives also met and discussed their industry when they came to Washington, DC for AAR board meetings. The Spring 2003 meeting of the NFTA occurred from April 2nd to April 6th, at the Wigwam resort, in Litchfield Park, Arizona.

65. Within just months of the Spring 2003 NFTA meeting, and as early as July 2003, the two Western Railroads, BNSF and UP, suddenly began to coordinate their Rail Fuel Surcharges. Prior to this time, the UP fuel surcharge had been adjusted monthly based on the WTI Index. The BNSF fuel surcharge had been based on the HDF Index. In or about July 2003, however, UP switched to the HDF Index pursuant to an agreement with the BNSF. From that point on, the Western Railroads moved in lockstep and charged the exact same Rail Fuel Surcharge percentage for each month of the class period.

66. BNSF and UP agreed to administer the HDF Index in precisely the same way. Whenever the U.S. average price of diesel fuel as measured by the HDF Index equaled or was lower than $1.35 per gallon, no surcharge was applied. When the HDF Index exceeded $1.35 per gallon, however, BNSF and UP both applied a surcharge of 0.5 percent for every five cent increase above $1.35 per gallon. So, for

example, if the HDF Index rose to $1.55 per gallon, BNSF and UP would apply a surcharge of 2 percent. The surcharge would increase 2 percent for every 20 cents increase in the HDF Index.

67. The Western Railroads also coordinated when they would change their fuel surcharge. They agreed that the Rail Fuel Surcharge would be applied to shipments beginning the second month after the month in which there was a change in the HDF Index average price calculation. So, for example, if the HDF Index average price changed in January, the Western Railroads would announce their new Rail Fuel Surcharge percentage on February 1 (always on the first day of the month), and then apply the surcharge to shipments in March. The Western Railroads published their monthly fuel surcharge percentages on their websites, making any deviation from cartel pricing easily detectable.

68. The Western Railroads' coordination is reflected in their simultaneous selection and adoption of the same novel, arbitrary and complex combination of features for their Rail Fuel Surcharge programs, including use of the HDF Index for fuel surcharges, setting the trigger point at $1.35 per gallon, and applying the surcharge in the second calendar month after the HDF Index average price had changed. The similarities are both too precise and too comprehensive to have been independent responses to any common market phenomenon that the Defendants were facing.

69. UP's move to the same fuel price index used by BNSF in July of 2003 is striking evidence of concerted conduct in light of the fact that just two months before, UP had announced a different modification to its existing fuel surcharge program. In April of 2003, UP made modifications to the trigger points it used for adjusting surcharges in its program, but did not change the index it employed. The fact that, just two months later, UP switched indices and began charging exactly the same surcharges as BNSF is further evidence that this switch was the result of concerted conduct.

70. Even having coordinated their fuel surcharges, however, BNSF and UP still faced the significant barrier to widespread use of fuel surcharges: specifically, the widely used private contracts had cost escalation provisions that already accounted for fuel. BNSF, UP, CSX and NS agreed to solve this problem by conspiring to remove fuel from the widely used cost escalation indexes, thereby paving the way for widespread imposition of the new fuel surcharge program in which all four of the Defendants could participate, and from which all four could earn excessive profits.

71. In the fall of 2003, BNSF and UP initiated an effort in the AAR to get all Defendants to agree on a fuel surcharge program that would enable the Defendants to take fuel costs out of the weighted RCAF and AII (which already permitted the Defendants to recover all of their fuel costs), and instead apply artificially high Rail Fuel Surcharges as a revenue enhancement mechanism: that is, use the

"surcharge" to charge a percentage increase on the total cost of the freight transport, regardless of the actual cost of fuel for that transport job. Through meetings and discussions within the AAR board on October 2-3, December 11-12 and otherwise in 2003, Defendants BNSF, UP, CSX and NS agreed to create and implement coordinated fuel surcharge programs, and to enforce their program through a variety of means discussed herein.

72. Pursuant to the agreements among Defendants BNSF, UP, CSX and NS, the Defendants, which dominate the AAR board, caused the AAR to announce in December 2003 the creation of an unprecedented, new All Inclusive Index Less Fuel (the AII-LF) – that is, a cost escalation index without fuel as a component. This new index was similar to the AII and the RCAF, except that this new index excluded fuel as a component. The AAR announcement in December 2003 stated: "This issue of AAR Railroad Cost Indexes inaugurates a new index: the All-Inclusive Index Less Fuel. This index is calculated using the same components and methods as the All-Inclusive Index uses for the Rail Cost Adjustment Factor, with the exception of the exclusion of the fuel component." This announcement, and the underlying decision to create the new index, were the collective action of the Defendants, and could not have been accomplished without the conspiracy. The new AII-LF specified the fourth quarter of 2002 as its base period.

73. Defendants BNSF, UP, CSX and NS conspired to cause the AAR to inaugurate the AII-LF so

that they could begin assessing separate, stand-alone Rail Fuel Surcharges, applied against the total cost of rail freight transportation, and coordinate that practice. The creation of this new index was an important, carefully-planned step taken collectively by the Defendants to allow implementation and continuation of their price fixing conspiracy – a conspiracy that would enable the Defendants to widely impose price increases on the entire cost of rail freight transport and thereby obtain additional revenues far beyond any actual increases in fuel costs. This step itself was a notable departure from past practice, and marked the first time that the AAR created a cost escalation index without a fuel cost component.

74. Defendant BNSF has admitted that it worked through the AAR to accomplish this revenue-generating measure in 2003. When asked how BNSF would be able to apply the new revenue-based fuel surcharges into contracts with coal shippers, John Lanigan ("Lanigan"), BNSF's Chief Marketing Officer, responded that BNSF would be able to do so because of the changes made to the RCAF through the AAR (that is, the new AII-LF). Referring to Matthew K. Rose, BNSF's Chairman, President, and CEO, Lanigan stated: "What happened last year, *and Matt led the charge on there*, is that there's a new index that [the AAR] has that's basically an index without fuel. ... So we'll do RCAF less fuel plus a direct fuel surcharge in the future." (emphasis added).

75. Almost immediately after the announcement in December 2003 of the new AII-LF (the cost escalation index without fuel), and pursuant to the conspiracy, the two Eastern Railroads, Defendants CSX and NS, suddenly moved into lockstep with fuel surcharges based on the WTI Index. This move into lockstep was part and parcel of, and flowed from, the aforementioned agreements implemented and executed by BNSF, UP, CSX and NS in late 2003.

76. Specifically, the Eastern Railroads agreed to apply a fuel surcharge whenever the monthly average WTI price exceeded $23 per barrel. When that happened, the Eastern Railroads' rates were increased 0.4 percent for every $1 that the price of WTI oil exceeded $23 per barrel. So, for example, if the price of WTI oil was $28 per barrel, the fuel surcharge percentage would be 2 percent. The Rail Fuel Surcharge would be adjusted upward at 2 percent for every $5 increase in the WTI average price.

77. The Eastern Railroads also coordinated when they would change their fuel surcharge – two calendar months after the WTI Index had adjusted, thereby adopting the same fuel surcharge price timing used by the Western Railroads. For example, if the WTI average price exceeded $23 per barrel in January, the Eastern Railroads would assess the applicable fuel surcharge percentage to all bills of lading dated in the month of March. In this way, Defendants could apply exactly the same fuel surcharge percentage month after month. The Eastern Railroads published their monthly fuel surcharge

percentages on their websites, making any deviation from cartel pricing easily detectable.

78. The Eastern Railroads' coordination is reflected in their simultaneous selection and adoption of the same novel, arbitrary and complex combination of features for their Rail Fuel Surcharge programs: including using the WTI Index for fuel surcharges, setting the trigger point at $23 per barrel, and applying the surcharge in the second calendar month after the average price of WTI oil had changed. The similarities, and the coordination with the Western Railroads, are too precise and too comprehensive to have been independent responses to any common market phenomenon that the Defendants were facing.

79. Thus, following the conspiratorial publication of the AII-LF, Defendants BNSF, UP, CSX and NS seized the opportunity and began to apply Rail Fuel Surcharges as a separate item on shippers' bills. The Defendants used monthly changes to their Rail Fuel Surcharges as an easy way to increase revenues in an across the board manner.

80. There was no legitimate business justification or natural explanation for the collective action of BNSF, UP, CSX and NS to cause the AAR to adopt and publish the AII-LF. Such a "revenue-based" fuel surcharge bore no direct relationship to Defendants' actual increase in fuel costs. The fuel surcharge program was not a cost recovery mechanism, but a revenue enhancement measure that could only have been accomplished by the Defend-

ants' conspiratorial action of getting fuel removed from the widely used cost escalation indexes. The AII and RCAF both included a fuel cost component, and the Defendants had used these indices for decades to measure fuel-cost increases. As an empirical matter, the fuel component of the AII and RCAF would have permitted the Defendants to recover all of their increased fuel costs throughout the conspiracy period. Thus, the motivation of BNSF, UP, CSX and NS in collectively causing the adoption of the AII-LF could not have been greater fuel cost recovery or more efficient fuel cost recovery.

81. The actions by Defendants thus were not independent responses to a common problem of increasing fuel costs. Rather, the only purpose in taking these collective actions was to begin assessing a stand-alone fuel surcharge applied to *revenue* (*i.e.*, the entire base rate for the freight shipment), not costs; to act in concert with one another in setting fuel surcharge prices and demanding them from shippers and customers; and to ensure collective enforcement of the program. That is, pursuant to their conspiracy, Defendants would now be able to apply the supposed fuel cost increase percentage to the *entire cost of the freight* shipment (notwithstanding that fuel only accounts for a portion of the costs of the shipment). Through this collective action, Defendants BNSF, UP, CSX and NS planned to use the stand-alone fuel surcharge as an easy way to dramatically increase profits without having to wait for new rail capacity to come on line to meet growing demand – so long as these railroads partici-

pated by not competing on fuel surcharge prices to undercut one another.

82. The creation and publication of a cost escalation index without a fuel component was not required by any regulatory body, nor was it necessary for any Defendant to institute independently its own individual fuel surcharge program. Instead, the creation of the Rail Fuel Surcharge program starting in 2003 was the joint action by BNSF, UP, CSX and NS to achieve their collective goal of generating additional profits through implementing revenue-based fuel surcharges.

83. As a result of the concerted action among BNSF, UP, CSX and NS, prices of Rail Fuel Surcharges charged to rail shippers and customers (members of the Class) were raised to or maintained at supra-competitive levels during the Class Period.

IMPLEMENTATION OF THE SCHEME: THE FUEL SURCHARGES IMPOSED BY THE DEFENDANTS

84. As detailed above, Defendants BNSF, UP, CSX and NS agreed in 2003 to remove fuel from the AII and RCAF, and thereby permit the application of separate Rail Fuel Surcharges as a multiplier percentage of the base rate charged for the rail freight transportation involved. This meant that the Fuel Surcharge could operate as a means to impose an effective across-the-board rate increase, and thereby raise revenue far beyond the actual costs of fuel (which could have continued to be recovered through the AII and RCAF). Defendants applied these sur-

charges not only to published tariff rates, but to the private contracts, and other traffic, not subject to rate regulation under federal law (*i.e.*, the unregulated rates at issue here).

85. With the conspiracy underway, the two Western Railroads, using the HDF index, moved in lockstep and charged virtually identical Rail Fuel Surcharges on a monthly basis throughout the Class Period.

86. The chart below shows that the Fuel Surcharge percentages charged by the Western Railroads for freight shipments varied before the Class Period began, but were identical starting in July 2003:

MONTHLY SURCHARGE PERCENTAGES -- WESTERN RAILROADS

MONTH	BNSF	UP
Jun-02	1.0%	0
Jul-02	1.0%	0
Aug-02	0	0
Sep-02	0	0
Oct-02	1.0%	0
Nov-02	2.0%	0
Dec-02	2.5%	0
Jan-03	2.0%	2.0%
Feb-03	2.0%	2.0%
Mar-03	2.5%	2.0%
Apr-03	4.5%	2.0%
May-03	2.0%	2.0%
Jun-03	3.0%	2.0%

MONTH	BNSF	UP
Jul-03	**2.5%**	**2.5%**
Aug-03	2.0%	2.0%
Sep-03	2.0%	2.0%
Oct-03	2.5%	2.5%
Nov-03	2.5%	2.5%
Dec-03	2.5%	2.5%
Jan-04	2.5%	2.5%
Feb-04	2.5%	2.5%
Mar-04	3.5%	3.5%
Apr-04	3.5%	3.5%
May-04	4.0%	4.0%
Jun-04	4.5%	4.5%
Jul-04	5.0%	5.0%
Aug-04	5.0%	5.0%
Sep-04	5.0%	5.0%
Oct-04	6.0%	6.0%
Nov-04	7.0%	7.0%
Dec-04	9.0%	9.0%
Jan-05	9.0%	9.0%
Feb-05	8.0%	8.0%
Mar-05	7.5%	7.5%
Apr-05	8.0%	8.0%
May-05	10.0%	10.0%
Jun-05	10.5%	10.5%
Jul-05	9.5%	9.5%
Aug-05	10.5%	10.5%
Sep-05	11.5%	11.5%
Oct-05	13.0%	13.0%
Nov-05	16.0%	16.0%
Dec-05	18.5%	18.5%

MONTH	BNSF	UP
Jan-06	13.5%	13.5%
Feb-06	12.0%	12.0%
Mar-06	12.5%	12.5%
Apr-06	12.5%	12.5%
May-06	13.5%	13.5%
Jun-06	15.0%	15.0%
Jul-06	16.5%	16.5%
Aug-06	16.5%	16.5%
Sep-06	17.0%	17.0%
Oct-06	18.0%	18.0%
Nov-06	15.5%	15.5%
Dec-06	13.0%	13.0%
Jan-07	13.0%	13.0%
Feb-07	14.0%	14.0%
Mar-07	12.5%	12.5%
Apr-07	12.5%	12.5%
May-07	14.5%	14.5%
Jun-07	16.0%	16.0%
Jul-07	15.5%	15.5%
Aug-07	16.0%	16.0%
Sep-07	16.5%	16.5%
Oct-07	16.5%	16.5%
Nov-07	17.5%	17.5%
Dec-07	18.5%	18.5%
Jan-08	21.5%	21.5%
Feb-08	21.0%	21.0%
Mar-08	21.0%	21.0%
Apr-08	21.5%	21.5%
May-08	26.5%	26.5%

87. As detailed above, there also was uniformity among the Eastern Railroads in the monthly surcharge percentages, based on the WTI Index, that they charged customers for most of the Class Period.

88. The chart below shows that the Fuel Surcharge Percentages charged by Defendants CSX and NS for carload shipments varied before the Class Period, but were identical starting in March 2004:

MONTHLY SURCHARGE PERCENTAGES -- EASTERN RAILROADS

MONTH	CSX	NS
Jun-03	2.4%	2.0%
Jul-03	2.4%	2.0%
Aug-03	3.2%	2.0%
Sep-03	3.2%	2.0%
Oct-03	3.6%	2.0%
Nov-03	2.4%	2.0%
Dec-03	3.2%	2.0%
Jan-04	3.6%	2.0%
Feb-04	4.0%	2.0%
Mar-04	**4.8%**	**4.8%**
Apr-04	4.8%	4.8%
May-04	5.6%	5.6%
Jun-04	5.6%	5.6%
Jul-04	7.2%	7.2%
Aug-04	6.4%	6.4%
Sep-04	7.2%	7.2%
Oct-04	8.8%	8.8%
Nov-04	9.2%	9.2%
Dec-04	12.4%	12.4%
Jan-05	10.4%	10.4%

MONTH	CSX	NS
Feb-05	8.4%	8.4%
Mar-05	9.6%	9.6%
Apr-05	10.0%	10.0%
May-05	12.8%	12.8%
Jun-05	12.4%	12.4%
Jul-05	10.8%	10.8%
Aug-05	13.6%	13.6%
Sep-05	14.4%	14.4%
Oct-05	16.8%	16.8%
Nov-05	17.2%	17.2%
Dec-05	16.0%	16.0%
Jan-06	14.4%	14.4%
Feb-06	14.8%	14.8%
Mar-06	17.2%	17.2%
Apr-06	15.6%	15.6%
May-06	16.0%	16.0%
Jun-06	18.8%	18.8%
Jul-06	19.2%	19.2%
Aug-06	19.2%	19.2%
Sep-06	20.8%	20.8%
Oct-06	20.4%	20.4%
Nov-06	16.4%	16.4%
Dec-06	14.4%	14.4%
Jan-07	14.8%	14.8%
Feb-07	16.0%	16.0%
Mar-07	12.8%	12.8%
Apr-07	14.8%	14.8%
May-07	15.2%	15.2%
Jun-07	16.4%	16.4%

89. In stark contrast to this uniformity in fuel surcharge percentages, fuel cost as a percentage of operating cost and fuel efficiency differs widely among the Defendant railroads. Absent collusion, it is extremely unlikely that Defendants, in both the east and the west, would independently price their Rail Fuel Surcharges to arrive at the identical percentage month after month, year after year, for a period of more than three years. The fact that Defendants moved in uniform lockstep for a period of nearly 38 months indicates that Defendants were coordinating their behavior and conspired to fix prices for Rail Fuel Surcharges. In addition, the advance announcements of each Defendant's Fuel Surcharges was an important implementation and enforcement mechanism for the conspiracy.

90. Railroad industry analysts took note of the curious "convergence" in Rail Fuel Surcharge methodologies adopted by the Defendants. For example, after concluding in 2003 that the Rail Fuel Surcharges charged by the Defendants were "not supported" by fuel cost increases, one analyst stated that she was "puzzled by the fact that the railroads appear to be matching fuel surcharges rather than developing their own pricing initiatives." The analyst noted further that "the way to gain significant market share is to lead the competition rather than following the competition." ("Following the Competition," *Traffic World*, July 14, 2003).

91. Defendants' use of retail price indices in furtherance of the conspiracy also allowed them to over-recover their actual fuel costs. According to an

economic analysis on Railroad Fuel Surcharge practices commissioned by the American Chemistry Council released in September 2007, Defendants overcharged rail shippers by more than $6.5 Billion between 2005 and the first quarter of 2007.

92. BNSF's average cost for diesel fuel in Third Quarter ("3Q") 2003 was $0.846 per gallon and its average cost of diesel fuel for 3Q 2004 was $0.988 per gallon. Thus, BNSF's cost of fuel increased 14.4% from 3Q 2003 to 2004. In contrast, the surcharge charged by BNSF based on the HDF 3Q 2003 price was $1.46 per gallon and $1.83 per gallon in 3Q 2004, amounting to a 25.3% increase. As a result of this disparity in increase percentages, shippers purchasing from BNSF paid 11% more than the actual price BNSF paid for fuel from 3Q 2003 to 2004. Shippers of unregulated freight from the other Railroad Defendants similarly over-paid during this and other periods particularly since the inflated percentage increase was applied to the entire rate at issue not merely to the fuel cost component of that rate. Another reason why Defendants' Rail Fuel Surcharges were not a natural reaction to increased fuel costs is that the surcharge levels disregarded gains in fuel efficiency. As explained in a 2007 AAR publication, the Defendants' fuel efficiency is "constantly improving." BNSF, for example, disclosed in 2005 that it had achieved a 9% improvement in fuel efficiency over the prior ten years. In 2006, the railroads could, on average, move one ton of freight 423 miles on one gallon of diesel fuel. By calculating fuel surcharges as a percentage of the shipping rate,

the Defendants deflected attention from the cost savings they achieved through fuel efficiency gains.

93. There is no independent business justification to explain Defendants' behavior. Their uniform pricing of fuel surcharges for more than a three-year period could not have happened by chance or coincidence. Nor was it an expected response to a common business problem. Any actual increased fuel costs experienced by the Defendants would have been covered by the AII and RCAF. The uniform pricing could only have been achieved by an express agreement followed by collective action – first, to decouple fuel prices from the historical railroad cost indices and, second, to agree upon new and complex indices and trigger points for computing the stand-alone fuel surcharge percentages. The Defendants' purpose was to use generally increasing fuel costs as a cover for implementing what were, in effect, across-the-board rate increases.

94. In agreeing to collude on fuel surcharges, each Defendant was acting against its independent short-term, economic self-interest. In a competitive environment, free of collusion, carriers with lower fuel costs could impose a lower surcharge and thereby increase market share at the expense of competing railroads. Rather than engage in such competitive behavior, Defendants instead restricted their freedom to price competitively and adhered to an industry-wide pattern of uniform fuel surcharge pricing based on the total cost of the freight.

OTHER ELEMENTS OF THE CONSPIRACY

95. At or about the time the Defendants agreed to fix the Rail Fuel Surcharge prices, the Defendants also took other steps in furtherance of the conspiracy. They largely switched from offering long-term contracts (the terms of which were secret) to offering contracts that were "re-priced" as often as monthly. Previously, Defendants had allowed, and often preferred, long-term contracts ranging up to five years with clauses that did not permit rate increases beyond a certain point, usually governed by the AII or the RCAF, or that excluded fuel surcharges altogether.

96. This collective movement away from long-term contracts meant that Defendants no longer offered discounts to increase market share and their pricing became more visible to each other.

97. Defendants made this switch even though most shippers preferred the former system in order to minimize risk and make costs more predictable. In a competitive environment, forcing customers to assume greater risks without any offsetting benefit (such as lower prices) would cause customers to seek alternatives, which should promote competition between carriers for their business. Here, all Defendants raised prices and did not offer any compensation to customers for assuming additional risk. Similarly, in a competitive market, one would expect that the railroads would seek, as they had in the past, to reduce their own risks and lock-in market share by entering into long-term contracts. The

Defendants, however, collectively refused to offer long-term contracts and took no steps to minimize their own risks from fluctuations in demand. This coordinated behavior was hardly routine market conduct.

98 In furtherance of the conspiracy, Defendants also declined to negotiate discounts on the Fuel Surcharges and overall contract rates, even though prior to mid-2003 it had been customary for the Defendants at least to entertain such negotiations. Shippers from many different industries, some with significant economic power, tried to negotiate the fuel surcharge percentages, but were told by the Defendants (who had previously been willing to negotiate discounts on rail freight rates) that the Rail Fuel Surcharges were "not negotiable." By way of example, during the relevant period the Archer-Daniels-Midland Company ("ADM") approached individual Defendants to discuss hedging opportunities to allow ADM and the railroads certainty and a method for cost-containment. The railroads, acting against their own best individual interests, refused to enter into hedging contracts with ADM.

99 In addition, several national shipper organizations met with each of the Defendants to encourage them to reexamine the methods used to assess Rail Fuel Surcharges. Among the Defendants, only BNSF agreed to make responsive changes to its surcharge program, and that was only for grain and coal shipments coming from certain regions where the BNSF is the only carrier. That is,

BNSF reduced fuel surcharges on traffic where it faced no competition from the UP, and thus would not violate the agreement to fix competitive prices. The other Defendants refused to address the concerns of their customers.

100. In furtherance of the conspiracy, Defendants also decreased the use of "through rates," in which a customer would receive a single bill from either the originating railroad or the termination railroad on a long-distance trip involving more than one railroad (so that a single fee would be allocated among the railroads that shipped). Instead, where a shipment requires movement on more than one railroad, the Defendants moved increasingly to having rates billed separately for each railroad, rather than as one quote for the entire shipment. Defendants made this change, which could only result from their collective action, as part of their conspiracy for two reasons: to provide transparency as to what each railroad was charging on multiple line shipments and to allow each Defendant to bill separately for its applicable fuel surcharge.

101. Defendants also agreed that none of the conspirators would be undercutting agreed pricing or "stealing" market share by using their increasing revenues to subsidize discounting of underlying rates. In fact, as can be seen from the table that follows, Defendants' market shares became more stable following the 2003 agreements than they had historically been.

Railroad Market Share: Originated Tons and Carloads 1998 - 2006[1]

	1998	1999	2000	2001	2002	2003	2004	2005	2006
BNSF									
Carloads Originated	6,739,202	6,876,523	6,909,907	6,928,188	6,999,061	7,662,699	8,237,466	8,727,121	9,335,024
Percent of Total Originated Carloads	31.9%	28.4%	26.5%	27.0%	26.9%	28.4%	29.2%	30.2%	31.2%
Tons Originated	429,408,242	440,180,814	434,255,161	442,932,381	438,123,355	460,789,676	483,296,128	498,121,970	539,511,527
Percent of Total Originated Tons	31.1%	28.5%	26.8%	27.2%	26.9%	27.8%	28.3%	28.7%	30.1%
CSXT[2]									
Carloads Originated	4,184,418	5,842,422	6,542,784	6,321,945	6,335,611	6,470,386	6,611,766	6,537,293	6,607,931
Percent of Total Originated Carloads	19.8%	24.1%	25.1%	24.6%	24.4%	24.0%	23.4%	22.6%	22.1%
Tons Originated	306,034,673	378,007,852	406,314,179	399,970,764	392,903,118	391,993,962	403,152,732	409,486,655	414,266,429
Percent of Total Originated Tons	22.1%	24.5%	25.1%	24.5%	24.1%	23.7%	23.6%	23.6%	23.1%
NS[3]									
Carloads Originated	3,621,159	4,351,478	5,214,436	5,025,864	5,098,926	5,115,859	5,524,545	5,800,390	5,824,813
Percent of Total Originated Carloads	17.1%	18.0%	20.0%	19.6%	19.6%	19.0%	19.6%	20.0%	19.5%
Tons Originated	233,133,810	270,383,729	320,700,204	310,449,934	307,770,416	306,322,113	319,014,426	325,779,848	323,407,280
Percent of Total Originated Tons	16.9%	17.5%	19.8%	19.0%	18.9%	18.5%	18.7%	18.8%	18.1%
UP									
Carloads Originated	6,570,086	7,137,090	7,364,503	7,393,306	7,580,376	7,692,160	7,831,823	7,874,879	8,132,004
Percent of Total Originated Carloads	31.1%	29.5%	28.3%	28.8%	29.1%	28.6%	27.8%	27.2%	27.2%
Tons Originated	413,615,706	453,417,016	459,428,341	476,759,328	489,305,241	497,373,006	503,052,146	503,056,340	514,357,111
Percent of Total Originated Tons	29.9%	29.4%	28.3%	29.2%	30.1%	30.0%	29.4%	29.0%	28.7%
Total									
Carloads Originated	21,114,865	24,207,513	26,051,630	25,669,303	26,013,974	26,941,104	28,205,600	28,939,683	29,899,772
Tons Originated	1,382,192,43	1,541,989,41	1,620,697,885	1,630,112,407	1,628,102,129	1,656,478,757	1,708,515,432	1,736,444,813	1,791,542,347

1 AAR Railroad Facts and Analysis of Class I Railroads
2 Data for 1998 and 1999 does not include all of the acquisition Conrail traffic

ADDITIONAL EVIDENCE OF ANTICOMPETITIVE CONDUCT

102. Apart from this direct evidence of price fixing, there is further support that Defendants agreed to fix prices for Rail Fuel Surcharges The rail transportation industry is marked by certain structural and other characteristics that make a price fixing conspiracy feasible:

(a) Defendants had a strong collective motive to enter into a price fixing conspiracy because conditions existed in the railroad industry that were conducive to collusion.

(b) The railroad industry is highly concentrated. Defendants are the only five remaining domestic Class 1 railroads following decades of mergers and consolidation. Defendants account for well over 90 percent of the nation's rail traffic, and there is no fringe or niche market of smaller carriers. There are also high fixed costs in the industry. Such high concentration and fixed costs facilitate a price fixing cartel.

(c) There are significant barriers to entry into the railroad industry. To compete, railroads must invest in a vast network of tracks, stations, yards, and switching facilities. These take decades to develop, and require onerous regulatory and environmental reviews and approval.

Land or easements are often needed, necessitating the involvement of multiple local governments and the exercise of eminent domain power. Because rail infrastructure is of minimal value for other purposes, and rail networks are difficult to assemble, the fixed costs are largely sunk, creating significant entry barriers. Entry also requires that a new entrant capture a significant market share from existing carriers. Entry is thus both expensive and risky.

(d) Rail Fuel Surcharges, when computed as a percentage of revenue, are highly standardized and fungible. Defendants structured their Rail Fuel Surcharges as a percentage of base rates and then published the percentages on their websites so the colluding railroads could monitor the conspiracy without the necessity of frequent communications. It is well recognized that markets having uniform and homogeneous products or services, such as rail freight transportation services, are susceptible to price fixing.

(e) The railroad industry has a long record of price fixing and other anti-competitive behavior. In the first antitrust case dealing with the railroad industry, *United States v. Trans-Missouri Freight*

Ass'n, 166 U.S. 290 (1897), the railroad cartel argued that it must fix prices or the industry would go bankrupt. Prior to deregulation, railroads engaged in open price fixing through establishment of "rate bureaus" and "rate making committees." The Rail Fuel Surcharge program engaged in by the Defendants is strikingly similar to those collective rate-making practices of the past.

(f) The CEOs of Defendants are all board members of the AAR, which facilitated exchange of pricing information. The AAR describes itself as "the central coordinating and research agency of the North American rail industry." Full membership, however, is available only to the seven Class I railroads operating in the United States, the five most significant of which are Defendants here (the other two Class I railroads are owned by Canadian companies). The AAR Board meets regularly and board members (and their staff) regularly communicate between meetings.

THE STB DECISION

103. On January 25, 2007, the STB, which regulates certain aspects of the railroad industry, issued an administrative decision concluding that the railroads' practice of computing Rail Fuel Surcharges as a percentage of base rate for rate-regulated rail

freight transport was an "*misleading and ultimately unreasonable practice*," because the fuel surcharges are not tied to the fuel consumption associated with the individual movements to which they are applied. *Rail Fuel Surcharges*, STB Ex Parte No. 661 (Jan. 25, 2007) (emphasis supplied).

104. The STB further stated that "the term 'fuel surcharge' most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. If it is used instead as a broader revenue enhancement measure, it is *mislabeled*." *Id.* (emphasis supplied).

105. The STB's decision addressed rate-regulated rail freight traffic only (which is not the subject of this Complaint). The STB expressly stated that its jurisdiction did not reach rail freight traffic under private contract or otherwise exempted from rate regulation.

106. Pursuant to their conspiracy, Defendants applied the same unreasonable fuel surcharge practices addressed by the STB to the private rail freight transportation contracts, and other unregulated freight transport, at issue in this case.

DEFENDANTS' SUPRACOMPETITIVE PROFITS

107. According to an economic analysis on railroad fuel surcharge practices commissioned by the American Chemistry Council released in September 2007, Defendants overcharged rail shippers by more than $6.5 Billion between 2005 and the first quarter

of 2007. The study's findings were based upon regulatory findings and other estimates from Defendants.

108. According to the article "Rail Fuel Surcharges – Fact Versus Fiction" in the trade press report *Rail Business* by Argus Media Inc. (Volume 14, 15) dated April 14, 2008, "[t]*he change in railroads overall operating expenses (including fuel) do not justify the large fuel surcharges railroads are applying to their movements.*" The article names several factors that have led to the circumstances in which railroads' fuel surcharges are greater than the change in total operating expense.

(a) Companies have established escalation methods, including fuel surcharges, to assure that they do not under-recover their costs of fuel as the price of oil has increased substantially. "[A] company will therefore frequently establish a margin of error in an escalation method that will ensure it is fully protected from cost increases. However, what is a small dollar margin of error...becomes a very large dollar margin of error as oil prices increase..."

(b) "[A]s railroads implemented practices to better manage their cost of fuel internally, they did not reflect these fuel cost improvements in their external fuel surcharge programs." In fact, "[N]one of the four major US railroads revised

their surcharge programs to account for the actions management took to control the cost of fuel. CN was the only railroad that continued to revise its fuel surcharge program and each time the program changed CN lowered its fuel surcharge to more closely reflect the change in its cost of fuel."

(c) "[T]he STB did not hold a hearing on fuel surcharges until May 2006. This was more than four years after the railroads initiated their fuel surcharge programs." However, "[T]he time to make sure a program like fuel surcharges is working properly is before the dollars generated by the program had a big impact on the railroads' financial statements."

(d) Finally, "[W]hen the STB issued the results of its findings from the fuel surcharge hearing it did not require railroads to provide any retroactive reporting on fuel expenses and fuel surcharge revenue."

109. Because fuel surcharges are generally designed to compensate for increases in fuel costs, they should bear a relatively constant relationship to the actual cost of fuel associated with the individual movements to which they are applied. But Defendants have used the Rail Fuel Surcharge not as a cost recovery mechanism, but as a revenue en-

hancement measure. By computing the Rail Fuel Surcharge as a percentage of the base rate charged the shipper, Defendants ensured that there would be no real correlation between the rate increase and the increase in fuel costs for the particular shipment to which the surcharge is applied.

110. Defendants reaped huge, supracompetitive profits as a result of the success of their conspiracy. Through their agreement to coordinate on Rail Fuel Surcharges, Defendants realized billions of dollars in revenues during the Class Period in excess of their actual increase in fuel costs from the specific customers on whom they imposed the surcharge. During the period of the conspiracy (July 2003 to the present), Defendants increased their market capitalization from approximately $40 billion to approximately $105 billion, or an increase of about 160 percent. The AAR Policy and Economics Department reported that railroad total operating revenue in the United States increased from $36.6 billion in 2003 to over $52 billion in 2006. These dramatic increases are at least in part attributable to fuel surcharge revenue realized by Defendants through their price fixing conspiracy. As the head of UP, Young, admitted in 2007, "three, four years ago [the Rail Fuel Surcharges] were really non-existent," and "it's only been the last couple of years that . . . the financial returns in this business has [sic] started to move in the right direction."

111. The unlawful conduct, combination or conspiracy alleged herein had and is having the following effects, among others:

(a) The Rail Fuel Surcharges charged to Plaintiffs and the Class for unregulated rail freight transportation have been fixed or stabilized at supra-competitive levels;

(b) Plaintiffs and the Class have been deprived of the benefits of free, open and unrestricted competition in the market for unregulated rail freight transportation; and

(c) competition in establishing the prices paid in the United States for unregulated rail freight transportation has been unlawfully restrained, suppressed and eliminated.

ANTITRUST INJURY TO INDIRECT PURCHASER PLAINTIFFS AND CLASS

112 The unlawful conduct, combination or conspiracy alleged herein had and is having the following effects, among others:

(a) The Rail Fuel Surcharges charged to Plaintiffs and the Class for unregulated rail freight transportation have been fixed, raised, maintained and/or stabilized at artificially high and supra-competitive levels;

(b) Plaintiffs and the Class have been deprived of the benefits of free, open and unrestricted competition in the

market for unregulated rail freight transportation;

(c) Plaintiffs and the Class have been required to pay more for Rail Fuel Surcharges than they would have had to pay in a competitive marketplace absent Defendants' price-fixing conspiracy; and

(d) Competition in establishing the prices paid in the United States for unregulated rail freight transportation has been unlawfully restrained, suppressed and eliminated.

113. During the Class Period, Defendants' Rail Fuel Surcharge conspiracy as described herein directly and proximately caused Plaintiffs and the Class to pay supra-competitive prices for Rail Fuel Surcharges that they would not have paid absent such violations. As a result, Plaintiffs and the Class have been injured and damaged in their business and property in an amount to be determined according to proof.

114. The entire supra-competitive overcharge for Rail Fuel Surcharges at issue was passed on to Plaintiffs and the Class.

115. Two antitrust scholars – Professor Robert G. Harris (Professor Emeritus and former Chair of the Business and Public Policy Group at the Haas School of Business at the University of California at Berkeley) and the late Lawrence A. Sullivan (Profes-

sor of Law Emeritus at Southwestern Law School and author of the Handbook of the Law of Antitrust) – have observed that "in a multiple-level chain of distribution, passing on monopoly overcharges is not the exception: it is the rule."

COUNT I

(Injunctive Relief for Violation of § 1 of the Sherman Act)

116. Plaintiffs repeat and re-allege the allegations set forth above as though fully set forth herein.

117. Defendants entered into and effectuated a contract, combination or conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act.

118. Defendants' contract, combination or conspiracy resulted in an agreement and/or concerted action between and among Defendants and their co-conspirators pursuant to which Defendants fixed, maintained and standardized prices for Rail Fuel Surcharges for rail freight transportation handled through private contracts as well as through other means exempt from regulation.

119. The contract, combination or conspiracy has had the following effects;

- the Rail Fuel Surcharges assessed to Plaintiffs and the Class for unregulated rail freight transportation have been fixed at supra-competitive levels;

- Plaintiffs and the Class have been deprived of the benefits of free competition in the market for unregulated rail freight transportation services; and

- competition in the establishing the prices paid for unregulated rail freight transportation in the United States have been unlawfully restrained, suppressed and eliminated.

120. Plaintiffs and the Class have suffered injury, and will continue to suffer injury in their business or property, proximately caused by Defendants' unlawful conduct, in that they have paid supra-competitive prices for Rail Fuel Surcharges applied to unregulated rail freight transportation services during the Class Period.

121. Plaintiffs and the Class are entitled to an injunction against Defendants, preventing and restraining the violations alleged herein.

COUNT II

(Violation of State Antitrust Laws)

122. Plaintiffs repeat and re-allege the allegations set forth above as though fully set forth herein.

123. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Arizona Revised Stat. §§ 44-1401 *et seq.*

124. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in

violation of California Bus. & Prof. Code §§ 16700 *et seq.* and California Bus. & Prof. Code §§ 17200 *et seq.*

125. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of District of Columbia Code Ann. §§ 28-4501 *et seq.*

126. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Iowa Code §§ 553.1 *et seq.*

127. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Kansas Stat. Ann. §§ 50-101 *et seq.*

128. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Maine Rev. Stat. Ann. 10, §§ 1 101 *et seq.*

129. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Michigan Comp. Laws Ann. §§ 445.773 *et seq.*

130. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Minnesota Stat. §§ 325D.52 *et seq.*

131. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Mississippi Code Ann. §§ 75-21-1 *et seq.*

132. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Nebraska Rev. Stat. §§ 59-801 *et seq.*

133. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Nevada Rev. Stat. Ann. §§ 598A *et seq*.

134. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of New Mexico Stat. Ann. §§ 57-1-1 *et seq*.

135. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of North Carolina General Statutes §§ 75-1, *et seq*.

136. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of North Dakota Cent. Code §§ 51-08. 1-01 *et seq*.

137. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of South Dakota Codified Laws Ann. Ch. 37-1 (including SDCL § 37-1-33).

138. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Tennessee Code Ann. §§ 47-25-101 *et seq*.

139. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Vermont Statutes, Title 9 §§ 2453, *et seq*.

140 By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of West Virginia §§ 47-18-1 *et seq*.

141. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Wisconsin Stat. §§ 133.01 *et seq*.

142. Class members in each of the states listed above paid supra-competitive, artificially inflated prices for rail freight services. As a direct and proximate result of Defendants' unlawful conduct, members of the Class in each of the identified states have been injured in their business and property in that they paid more for rail freight services than they otherwise would have paid in the absence of Defendants' unlawful conduct.

COUNT III

(Violation of State Consumer Protection and Unfair Competition Laws)

143. Plaintiffs repeat and re-allege the allegations set forth above as though fully set forth herein.

144. Defendants' conduct described herein constitutes unfair competition or unfair, unconscionable, deceptive or fraudulent acts or practices in violation of the state consumer protection and unfair competition statutes listed below.

145. Defendants have engaged in unconscionable, unfair or deceptive acts of practices in violation of Arkansas Code § 4-88-101 *et seq*.

146. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of California Bus. & Prof. Code § 17200 *et seq*.

147. Defendants have engaged in unfair competition or unconscionable, unfair or deceptive acts or practices in violation of District of Columbia Code § 28-390 1 *et seq*.

148. Defendants have engaged in unfair competition or unconscionable, unfair or deceptive acts or practices in violation of Florida Stat. § 501.201 *et seq*.

149. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq*.

150. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Kansas Stat. § 50-623 *et seq*.

151. Defendants have engaged in unfair competition or unfair or deceptive acts or practices with respect to rail freight services that were indirectly purchased primarily for personal, family, or household purposes in violation of 5 Maine Rev. Stat. § 207 *et seq*.

152. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Nebraska Rev. Stat. § 59-1601 *et seq*.

153. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New Hampshire Rev. Stat. § 358-A:1, *et seq*.

154. Defendants have engaged in unfair competition or unconscionable, unfair or deceptive acts or

practices in violation of New Mexico Stat. § 57-12-1 *et seq*.

155. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New York Gen. Bus. Law § 349 *et seq*; and New York common law against restraints of trade.

156. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of North Carolina Gen. Stat. §§ 75-1.1, *et seq*.

157. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Oregon Rev. Stat. § 646.605 *et seq*.

158. Defendants have engaged in unfair competition or unfair or deceptive acts or practices with respect to rail freight services that were indirectly purchased primarily for personal, family, or household purposes in violation of Rhode Island Gen. Laws § 6-13.1-1 *et seq*.

159 Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 9 Vermont § 2451 *et seq*.

160. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of West Virginia Code § 46A-6-101 *et seq*.

161. Class members in each of the states listed above paid supra-competitive, artificially inflated prices for rail freight transportation services. Defen-

dants' mislabeled the Rail Fuel Surcharge and misled Plaintiffs and the Class as the Rail Fuel Surcharge is a revenue enhancement measure instead of a mechanism to recover fuel costs. As a direct and proximate result of Defendants' unlawful, unfair, unconscionable, deceptive and misleading conduct, Plaintiffs and the Class members in the identified states have been injured in their business and property in that they paid more for rail freight services than they otherwise would have paid in the absence of Defendants' flagrant, willful, unlawful, unfair, unconscionable, deceptive and misleading conduct.

COUNT IV

(Unjust Enrichment and Disgorgement of Profits)

162. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

163. Defendants have been unjustly enriched through overpayments by Plaintiffs and Class members and the resulting profits enjoyed by Defendants as a direct result of such overpayments in violation of the federal common law as well as common and statutory laws of the following States: Arizona, Arkansas, California, District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North

Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin. Plaintiffs' detriment and Defendants' enrichment were related to and flowed from the conduct challenged in this Complaint.

164. Under common law principles of unjust enrichment, Defendants should not be permitted to retain the benefits conferred via overpayments by Plaintiffs and Class members.

165. Plaintiffs seek disgorgement of all profits resulting from such overpayments and establishment of a constructive trust from which Plaintiffs and Class members may seek restitution.

WHEREFORE, Plaintiffs pray for relief as follows:

(A) That the Court determine that this action may be maintained as a class action under Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, that Plaintiffs be appointed as class representatives, and that Plaintiffs' counsel be appointed as counsel for the Class;

(B) That the unlawful contract, combination and conspiracy alleged herein be adjudged and decreed to be:

(1) An unreasonable restraint of trade in violation of Section 1 of the Sherman Act as alleged in Count One herein;

(2) An unlawful combination, trust, agreement, understanding, and/or

concert of action in violation of the state antitrust laws identified in Count Two herein;

(3) Violations of the state consumer protection and unfair competition laws identified in Count Three herein; and

(4) Acts of unjust enrichment as set forth in Count Four herein.

(C) That Plaintiffs and the Class recover compensatory damages, as provided by law, determined to have been sustained by each of them, and that judgment be entered against Defendants on behalf of Plaintiffs and each and every member of the Class;

(D) That Defendants, and each of Defendants' respective officers, directors, agents and employees, and all other persons acting on behalf of or in concert with them, be permanently enjoined and restrained from, directly or indirectly, continuing or maintaining the combination, conspiracy or agreement alleged herein;

(E) That Plaintiffs and members of the Class be awarded restitution, including disgorgement of profits obtained by Defendants as a result of their acts of unfair competition, deceptive practices and unjust enrichment;

(F) That Plaintiffs and the Class recover treble damages, as provided by law;

(G) That Plaintiffs and the Class recover their costs of the suit, including attorneys' fees, as provided by law; and

(H) For such other and further relief as the Court may deem just and proper.

Dated: April 15, 2008

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175

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In The

Supreme Court of the United States

FAYUS ENTERPRISES, INC., *et al.*,

Petitioners,

v.

BNSF RAILWAY, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the court of appeals correctly concluded, consistent with the decisions of other circuit courts and with prior precedent of this Court, that Petitioners' state law antitrust, unfair competition and unjust enrichment claims directly challenging the fairness of Respondent railroads' rates and practices amounted to "regulation" of rail transportation that is preempted under the express terms of the ICC Termination Act of 1995?

RULE 29.6 STATEMENT

1. BNSF Railway Company

BNSF Railway Company is a wholly owned subsidiary of Burlington Northern Sante Fe Corporation ("BNI"), a publicly-held company.

Berkshire Hathaway, Inc. is the only publicly held company with a 10% or greater ownership interest in BNI.

2. CSX Transportation, Inc.

CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation.

CSX Corporation is a publicly held company. No other publicly held entity owns more than 10% of its stock.

3. Norfolk Southern Railway Corporation

Norfolk Southern Railway Corporation is a wholly owned subsidiary of Norfolk Southern Corporation, a corporation whose stock is publicly traded.

To the best of its knowledge, no entity has a 10% or greater ownership interest in Norfolk Southern Corporation.

4. Union Pacific Railroad Company

Union Pacific Corporation, a publicly-traded Utah corporation, owns 62.6% of Union Pacific Railroad Company, a Delaware Corporation.

Southern Pacific Rail Corporation, a Utah Corporation and a wholly owned subsidiary of Union Pacific Corporation, owns the remaining 37.4% of Union Pacific Railroad Company.

Union Pacific Corporation is a publicly held company. No publicly owned company owns 10% or more of Union Pacific Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTRODUCTION ..... - 1 -

STATEMENT OF THE CASE ..... - 4 -

A. Statutory History ..... - 4 -

B. Petitioners' Claims ..... - 7 -

C. The District Court Decision ..... - 8 -

D. The D.C. Circuit Decision ..... - 9 -

REASONS FOR DENYING THE PETITION ..... - 11 -

I. THE D.C. CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT ..... - 11 -

II. THE COURT OF APPEALS PROPERLY HELD THAT THE PLAIN LANGUAGE OF SECTION 10501(b) PREEMPTS STATE-LAW REGULATION OF RAILROAD RATES ..... - 17 -

III. THE PRESUMPTION AGAINST PREEMPTION DOES NOT APPLY TO RAIL REGULATION, AND EVEN IF IT DID, IT WOULD HAVE NO BEARING ON THE OUTCOME OF THIS CASE ..... - 22 -

CONCLUSION ..... - 25 -

TABLE OF AUTHORITIES

Cases

Adrian & Blissfield R.R. Co. v. City of Blissfield,
550 F.3d 533 (6th Cir. 2008) 12

American Airlines v. Wolens,
513 U.S. 219 (1995) 2, 24

Burlington N. Santa Fe Corp. v. Anderson,
959 F. Supp. 1288 (D. Mont. 1997) 20

Chicago & N. Western Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981) 2

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 13

City of Auburn v. United States,
154 F.3d 1025 (9th Cir. 1998) .....passim

City of Lincoln v. STB,
414 F.3d 858 (8th Cir. 2005) 12, 15, 19

City of Seattle v. Burlington N. R.R. Co.,
41 P.3d 1169 (Wash. 2002)..... 20

CSX Transp., Inc. v. City of Plymouth,
92 F. Supp. 2d 643 (E.D. Mich. 2000)..... 22

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 13

CSX Transp., Inc. v. Georgia Public Serv. Comm'n,
944 F. Supp. 1573 (N.D. Ga. 1996) 9, 20

CSX Transp., Inc. v. Williams,
406 F.3d 667 (D.C. Cir. 2005) 22

Emerson v. Kansas City S. Ry.,
503 F.3d 1126 (10th Cir. 2007) 12

Florida E. Coast Ry. Co. v. City of West Palm Beach,
266 F.3d 1324 (11th Cir. 2001) .....passim

Franks Inv. Co. LLC v. Union Pac. R.R. Co.,
593 F.3d 404 (5th Cir. 2010) .....passim

Friberg v. Kansas City Southern Ry. Co.,
267 F.3d 439 (5th Cir. 2001) .....passim

G & T Terminal Packaging Co. v. Consolidated Rail Corp.,
830 F.2d 1230 (3d Cir. 1987)..... 2, 5

Green Mountain R.R. Corp. v. Vermont,
404 F.3d 638 (2d Cir. 2005)..... 12, 19, 20

Guckenberg v. Wisc. Cent. Ltd.,
178 F. Supp. 2d 954 (E.D. Wisc. 2001) 14, 19, 20

In re Air Cargo Shipping Servs. Antitrust Litig.,
2008 U.S. Dist. LEXIS 107882 (E.D.N.Y. Sept. 26, 2008)..... 24

In re Korean Air Lines Co. Antitrust Litig.,
567 F. Supp. 2d 1213 (C.D. Cal. 2008)..... 24

Maynard v. CSX Transp., Inc.,
360 F. Supp. 2d 836 (E.D. Ky. 2004)..... 19

Medtronic v. Lohr,
518 U.S. 470 (1996) 13

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 2, 13, 24, 25

New York Susquehanna and W. Ry. Corp. v. Jackson,
500 F.3d 238 (3d Cir. 2007)..... 12, 13, 21, 24

Norfolk S. Ry. Co. v. City of Alexandria,
608 F.3d 150 (4th Cir. 2010) 12, 22

PCI Transp., Inc. v. Fort Worth & Western R.R. Co.,
418 F.3d 535 (5th Cir. 2005) 19

Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.,
297 F. Supp. 2d 326 (D. Me. 2003)..... 14, 19, 20

Port City Properties v. Union Pacific R.R. Co.,
518 F.3d 1186 (10th Cir. 2008) 19

Railroad Ventures, Inc. v. STB,
299 F.3d 523 (6th Cir. 2002) 20, 22

Riegel v. Medtronic,
552 U.S. 312 (2008) 3, 13

Rowe v. New Hampshire Motor Transp. Ass'n,
552 U.S. 364 (2008) 2, 24

Rubin v. United States,
449 U.S. 424 (1981) 23

Rushing v. Kansas City S. Ry. Co.,
194 F. Supp. 2d 493 (S.D. Miss. 2001)..... 20

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 3

San Luis Cent. R.R. v. Springfield Terminal Ry. Co.,
369 F. Supp. 2d 172 (D. Mass. 2005) 14

Soo Line R.R. Co. v. City of Minneapolis,
38 F. Supp. 2d 1096 (D. Minn. 1998) 20

Texas & Pa. Ry. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 2

United States v. Locke,
529 U.S. 89 (2000) 22

Village of Ridgefield Park v. New York Susquehanna & W. Ry. Corp.,
750 A.2d 57 (N.J. 2000) 19

Wisconsin Cent. Ltd. v. City of Marshfield,
160 F. Supp. 2d 1009 (W.D. Wis. 2000) 20

Statutes

49 U.S.C. § 10101 5

49 U.S.C. § 10102(9) 21

49 U.S.C. § 10501(b) ..... passim

49 U.S.C. § 10704 12

49 U.S.C. § 10709 4

49 U.S.C. § 11704 12

ICC Termination Act of 1995,
Pub. L. No. 104-88, 109 Stat. 803 ..... passim

Staggers Rail Act,
Pub. L. No. 96-448, 94 Stat. 1895 4

Legislative Materials

H. R. Conf. R. No. 104-422 (1995) 6

H.R. Rep. No. 104-311 (1995) 7

S. Rep. No. 104-176 (1995)..... 7

Rules

Sup. Ct. R. 14.4 10

Administrative Proceedings

Cities of Auburn and Kent, WA—Pet. for Dec. Order—
STB Fin. Dct. No. 33200, 1997 WL 362017 (July 1, 1997)..... 21

Friends of the Aquifer—Pet. for Dec. Order,
STB Fin. Dkt. No. 33966, 2001 WL 928949 (Aug. 10, 2001..... 20

North San Diego County Transit Dev. Bd.—Pet. for Dec. Order,
STB Fin. Dkt. No. 34111,
2002 WL 1924265 (Aug. 19, 2002) 20

Rail Fuel Surcharges,
STB Ex Parte No. 661, 2007 WL 201205 (Jan. 25, 2007)..... 12

INTRODUCTION

The United States Court of Appeals for the District of Columbia correctly applied a clear statute in a manner consistent with other courts of appeal. Therefore, Petitioners have failed to present a compelling reason for the Court to grant certiorari in this case.

The ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, preempts Petitioners' state law antitrust, consumer protection, unfair competition and unjust enrichment claims. ICCTA amended Title 49 of the United States Code to provide:

> The jurisdiction of the [Surface Transportation Board] over ... transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules ... practices, routes, services, and facilities of such carriers ... is exclusive. Except as provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.
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> 49 U.S.C. §10501(b).

This broad preemption provision reflects Congress' intent to ensure that the national rail network will continue to operate free of a patchwork of inconsistent state regulation. That network depends upon the uniformity of rules for the efficient shipment of goods between states, often over the lines of different interconnecting rail carriers. For over 100 years the national rail network has operated under comprehensive federal oversight,

consistent with a national transportation policy. The expansive federal role in regulating the rail system has left no room for challenges to rail rates and terms of service under state law. *See Texas & Pa. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (common law challenge to reasonableness of rail rates was preempted as inconsistent with Interstate Commerce Act); *Chicago & N. Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) (state law claim for abandonment of rail line was preempted). The federal policy to preempt state law continued even as certain railroad activities were deregulated. *See G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230 (3d Cir. 1987) (post-Staggers Act common law claim for alleged unreasonable rail surcharge preempted). The need for uniform treatment of national transportation systems under federal law is also reflected in the prior opinions of this Court concerning preemption in the airline industry (*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *American Airlines v. Wolens*, 513 U.S. 219 (1995)) and trucking industry (*Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008)).

Petitioners' state law claims attack directly the "fairness" of Defendants' fuel surcharges. Appendix to Petition ("App.") 20a. In affirming the district court's ruling dismissing these claims, the D.C. Circuit correctly decided that the claims attempted to "resurrect[ ] in a different form state-level regulation of railroads, by inviting judicial supervision of the reasonableness and fairness of rates charged to shippers." App. 24a. Indeed, as the circuit court noted, Petitioners candidly admitted in their pleadings that the real purpose of their state

law claims was to regulate Respondents' conduct. Petitioners asserted that their claims sought to "enforce" a ruling of the Surface Transportation Board ("STB") concerning *regulated* rail traffic by extending that ruling to "claims arising in private contract." App. 21a.

The circuit court's decision is in harmony — not in conflict — with the decisions of other circuit courts, which have identified economic regulation of transportation by rail carriers as the primary focus of ICCTA preemption. It is also in harmony — not in conflict — with the relevant decisions of this Court, which have held that state law damage claims were preempted in other industries because a damage award "can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Riegel v. Medtronic*, 552 U.S. 312, 324 (2008) (citing the same principle and discussing prior decisions to the same effect).

Moreover, the circuit court's conclusion that adjudication of Petitioners' state law claims would amount to state law regulation of rail transportation is solidly grounded in the language of the ICCTA preemption provision, which provides that the remedies concerning the "rates" and "practices" of rail carriers are exclusively within the federal regulatory province. 49 U.S.C. § 10501(b).

Additionally, any "presumption against preemption" does not apply where a state purports to act in an area that is historically subject to extensive federal regulation. Since its advent, rail freight transportation has been comprehensively regulated by the federal government. In any event, applying a presumption would not change the

outcome here, given the language of the controlling preemption statute. A presumption against preemption is irrelevant when Congress has expressed its intent to preempt in a statute.

The decision below is in accord fully with the prior precedent of this Court and other circuit courts. Both courts below correctly recognized that Petitioners' interpretation of the ICCTA preemption provision would open the door to state regulation of a national, networked transportation system, which Congress clearly intended to preclude. The Petition for Certiorari should be denied.

STATEMENT OF THE CASE

A. Statutory History

For almost 100 years, the Interstate Commerce Commission ("ICC") exercised comprehensive regulatory control over rail carrier rates and practices. In 1980, however, Congress passed the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), which substantially deregulated the rail industry and for the first time permitted carriers to enter into private contracts with shippers. 49 U.S.C. § 10709.

In eliminating direct federal regulation for some categories of rail traffic in the Staggers Act, Congress did not open the door to state regulation of such shipments. As the D.C. Circuit correctly noted, the Staggers Act instead expressly codified the prevailing rule of federal preemption of state law (App. 9a-10a), by providing that "[t]he jurisdiction of

the Commission ... over transportation by rail carriers, and the remedies provided in this title *with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.*" Pub. L. No. 96-448, §214(c)(5), 94 Stat. at 1915 (emphasis added). This provision provided an express statutory basis for federal preemption of state law, even for traffic that is now deregulated. *See G. & T. Terminal Packaging*, 830 F.2d at 1234 (holding that the Staggers Act preempted common law rate remedies for traffic that was exempt from federal regulation).

ICCTA, passed in 1995, continued the process of deregulation. *See* 49 U.S.C. §§ 10101, *et seq.* ICCTA created the STB as a successor to the ICC to provide regulatory oversight with respect to some categories of rail traffic, and further limited the STB's authority to regulate private rail contracts. App. 14a. As with the Staggers Act, Congress did not intend ICCTA's deregulation provisions to open the door to state law challenges to rail carrier rates and practices, which had been precluded for nearly a century. *See G & T Terminal Packaging Co.*, 830 F.2d at 1234 ("From the time *Abilene Cotton Oil* was decided to date, no case has permitted a shipper to challenge a freight rate in a common law action"). To the contrary, ICCTA reenacted the expansive preemption clause, broadening it to eliminate a previous authorization for federally-certified state oversight, and supplementing the "exclusive jurisdiction" provision with the "exclusive remedies" clause. App. 13a-15a[1]

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[1] As Petitioners point out, ICCTA eliminated former section 10103 (which had provided that the remedies specified

The legislative history confirms that in doing this Congress intended to continue to completely preclude state regulation of rail rates and practices. The House report stated that:

> The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

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in the subtitle were cumulative of remedies under other laws, "except as otherwise provided under this subtitle"), and expressly stated in Section 10501(b) that the remedies provided under the rail part of Title 49 are "exclusive." Petition at 17-18. However, the legislative history of ICCTA confirms that the change was simply meant to confirm the scope of preemption that already existed. The Conference Report on ICCTA noted that "[f]ormer section 10103 dealt with remedies in all modes of transportation regulated by the ICC, but since 1980, former section 10501(d) and 11501(b), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act." H. R. Conf. R. No. 104-422 at 167 (1995).

> H.R. Rep. No. 104-311, at 95-96 (1995) (emphasis in original).

The Senate report similarly stated that:

> [N]othing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill. . . . The railroad system in the United States is a nationwide network. . . . Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would waken [sic] the industry's efficiency and competitive viability.

S. Rep. No. 104-176, at 6 (1995).

This legislative history strongly supports the court of appeal's conclusion that none of the changes in ICCTA reduced the scope of Staggers Act preemption. App. 13a.

B. Petitioners' Claims

Petitioners are indirect purchasers of rail freight services. Their Consolidated Amended Complaint ("Complaint") asserts claims for damages under the antitrust laws of eighteen states and the District of Columbia (Count II); the unfair competition and consumer protection laws of fifteen states and the District of Columbia (Count III); and unjust enrichment theories under the law of twenty-five

states and the District of Columbia (Count IV). App. 129a — 136a.[2]

Petitioners' Complaint expressly challenges both the reasonableness of Respondents' conduct and the level of Respondents' rates for rail services. For example, the Complaint alleges that the Respondents' conduct was "unlawful and unfair" (App. 134a – 135a); that Petitioners "paid supra-competitive, artificially inflated prices for rail freight services" (App. 132a, 134a); and that Respondents used fuel surcharges as a means to raise rail rates "across the board" (App. 73a, 80a).

Petitioners' description of their claims in their Petition confirms that their state law claims are intended to challenge Respondents' rail prices. Petitioners explain that the theory stated in their Complaint is that Respondents used a percentage-based fuel surcharge "to achieve an across-the-board rate increase on unregulated traffic," and that Respondents used the fuel surcharge "as a way to increase revenue beyond the real increased cost of fuel...." Petition at 7-8.

C. The District Court Decision

The district court granted Respondents' motion to dismiss Petitioners' state law claims on the ground

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[2] Numerous other related cases brought by direct purchasers of rail services under federal antitrust law were centralized by the Judicial Panel on Multidistrict Litigation and remain pending before Judge Friedman in the District Court for the District of Columbia. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, Misc. No. 1:07-MC-00489-PLF.

that they are preempted by ICCTA. Consistent with other courts that have examined ICCTA's preemption language, the court found that "'[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" App. 40a-41a (quoting *CSX Transp., Inc. v. Georgia Public Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). Citing the "plain and explicit" language of Section 10501(b), as well as the decisions of other courts interpreting the clause, the district court held that "for this Court to resolve plaintiffs' claims would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been – creating just the patchwork of railroad regulation that ICCTA sought to preempt." App. 43a-44a.

D. The D.C. Circuit Decision

The court of appeals affirmed the district court's ruling. Much of the court of appeals' opinion is directed to an argument that Petitioners do not make in their Petition. Petitioners' primary argument below was that the preemption provision in Section 10501(b) does not apply to rail freight transported under private contracts, which Congress exempted from federal regulatory requirements beginning with the Staggers Act and continuing with ICCTA. Under Petitioners' reading, such traffic would be subject to plenary state regulation, despite Congress's express deregulatory intent.[3] The court

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[3] Although Petitioners identify this issue in their statement of the "Question Presented" in their Petition, other

of appeals held that Petitioners' reading of the statute was "plainly erroneous." App. 9a. Providing an exhaustive review of the statutory text, prior case law, and legislative history, the court demonstrated that Section 10501(b)'s preemption language applied to traffic moving by private contract, and that Congress, in further *deregulating* the rail freight industry with ICCTA, did not intend to open the door to state regulation of such traffic. App. 9a-15a.

The court of appeals also rejected what it characterized as Petitioners' "fallback" argument below (which is the sole argument that Petitioners make in their Petition) – *i.e.*, that their claims do not involve "regulation of rail transportation." App. 15a. The court discussed other circuits' opinions that have considered ICCTA preemption, and explained that those decisions establish that the "core" of ICCTA preemption is economic regulation of rail carriers. App. 16a-18a. The court held that, "[a]s pitched in this litigation," Petitioners' state law claims "would directly interfere with the ICCTA's deregulatory objectives," because those claims challenged the fairness of the railroads' contracts, including "the manner in which the rates were computed." App. 20a.

In so doing, the court noted that Petitioners' own pleadings confirmed that the relief they sought amounted to regulation of rail rates and practices. The court observed that Petitioners relied heavily in

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than a passing reference to the court of appeals' discussion of the issue (Petition at 18-19, n.6) they make no argument concerning the issue in the body of their Petition. Petitioners' failure to support this purported question with any argument is sufficient reason to reject it as a ground for granting certiorari. Sup. Ct. R. 14.4.

the district court on a prior decision of the STB finding that rate-based fuel surcharges were an "unfair practice" with respect to traffic that remains under the STB's regulatory authority. And the court explained that Petitioners "made no bones about their goal of extending the remedies that the STB ordered for *regulated* freight to freight over which Congress deliberately stripped the STB – *and states* – of any regulatory authority." App. 21a (emphasis in original).

REASONS FOR DENYING THE PETITION

Petitioners make three arguments in favor of certiorari. First, they assert that there is a conflict among the lower courts over the preemptive scope of Section 10501(b). Second, they contend that the lower court's decision does not comport with the plain language of the statute. Finally, Petitioners suggest that the court of appeals erred in failing to discuss the "presumption against preemption." As demonstrated below, each of these arguments lacks merit, and, thus, there is no reason for this Court to grant certiorari.

I. THE D.C. CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT

Section 10501(b) gives the STB "exclusive" jurisdiction over transportation by rail carriers, including the remedies for the "rates" and "practices" of such carriers; and the statute expressly confirms that the remedies provided in ICCTA "with respect to regulation of rail transportation" are exclusive

and preempt any remedies under State law. 49 U.S.C. § 10501(b). Fuel surcharges indisputably involve rail carrier "rates" and practices, and adjudicating the reasonableness of those surcharges and awarding damages on that basis is quintessential "regulation." 49 U.S.C. §§ 10704 and 11704. The STB and the ICC before it have long applied the remedies in the statute to regulate both the railroads' practice of charging such surcharges and the reasonableness of those surcharges. *See, e.g., Rail Fuel Surcharges*, STB Ex Parte No. 661, 2007 WL 201205 (Jan. 25, 2007).

Petitioners are wrong in claiming that the court of appeals' decision conflicts with the decisions of other circuits. In fact:

All of the circuit courts that have addressed the issue agree that if a state law has the effect of regulating rail transportation, it is expressly preempted by Section 10501(b). *See, e.g., Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010); *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010); *Adrian & Blissfield R.R. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1131-32 (10th Cir. 2007); *New York Susquehanna and W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *City of Lincoln v. STB*, 414 F.3d 858, 860-61 (8th Cir. 2005); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *Florida E. Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331-32 (11th Cir. 2001); *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998).

No court has allowed the application of state laws to assess the reasonableness of a railroad's rates

under ICCTA preemption. On the contrary, as the court of appeals correctly observed in its decision (App. 17a), the courts are clear that when it comes to "economic regulation," which is at the core of ICCTA's regulatory concern, state-law remedies are preempted. *See, e.g., Jackson*, 500 F.3d at 252 (core concerns of ICCTA preemption are "economics and finances" of the rail industry, including railroads' "rates, terms of service, [and] accounting practices"); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (items specifically listed in ICCTA and that have significant economic ramifications for railroads are covered by ICCTA preemption).

That the state law here would be applied by a judge and jury, rather than a state regulatory agency, makes no difference. As a general matter, this Court has repeatedly held that damages assessed by juries in civil lawsuits under general state statutes or common law can effectively exercise state regulatory power. *See, e.g., Riegel*, 552 U.S. at 323-34, citing *Medtronic v. Lohr*, 518 U.S. 470, 504 (1996), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (holding that a liability award "'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'") *See also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (holding that "[l]egal duties imposed on railroads by the common law fall within the scope" of preemption under the Federal Railroad Safety Act); *Morales*, 504 U.S. at 378-79 (holding that application of general state consumer protection laws to the fairness of airline fare advertising was preempted by the Airline Deregulation Act).

The courts applying ICCTA have likewise made clear that ICCTA preemption is as applicable to general state statutory or common law remedies applied by judges and juries as it is to the regulatory efforts of state or local governmental authorities. *See, e.g., Friberg,* 267 F.3d at 444 (ICCTA preemption cannot be "circumvented by allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions"); *Guckenberg v. Wisc. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wisc. 2001) ("[S]tate regulation can be as effectively exerted through an award of damages as through some form of preventive relief"); *San Luis Cent. R.R. v. Springfield Terminal Ry. Co.*, 369 F. Supp. 2d 172, 177 (D. Mass. 2005) (ICCTA preempts state law tort and statutory claims regarding rail car service and car hire fees because an award of damages can "improperly serve to regulate rail transportation"); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 297 F. Supp. 2d 326, 333 (D. Me. 2003) ("[A]wards of damages pursuant to state tort claims may qualify as state 'regulation' when applied to restrict or burden a rail carrier's operations").

Petitioners cite no case that suggests that state-law remedies for "unreasonable" or 'unfair" railroad rates can avoid ICCTA preemption. They discuss only two circuit court cases, *Franks* and *City of West Palm Beach*, which they claim conflict with the decision below. Petition at 24-29. But there is no conflict at all. Neither of those cases suggests that the application of state laws to regulate core railroad functions—like the rates a railroad charges its shippers—can escape ICCTA preemption. *City of West Palm Beach* evaluated the application of zoning laws to a non-railroad's conduct of a business on

property it leased from a railroad. The Eleventh Circuit held that the non-rail carrier's activity was not within the ambit of Section 10501(b), because that section applied only to activities by "rail carriers." 266 F.3d at 1330.

Similarly, the Fifth Circuit in *Franks* held that the application of state property law to the closure of private crossings was not preempted, because the application of state law to that activity did not interfere with rail operations. 593 F.3d at 411-12. The court specifically distinguished the rail crossings at issue from the "significant" subjects listed in the exclusive jurisdiction portion of Section 10501(b), "dealing with the basics of the functions of railroads, *e.g.*, ***rates*** and routes." 593 F.3d at 409 (emphasis added). The court also specifically distinguished the situation it was evaluating from the other cases, including its own prior precedent, which had concluded that the maintenance of actions under state tort, environmental, or property laws were preempted because they would interfere with rail operations. *Id.* at 411 (discussing *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001), *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), and *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005)).

The D.C. Circuit correctly concluded, consistent with the legal framework and outcomes of *Franks* and *City of Palm Beach*, that Petitioners' state law challenge to the reasonableness and fairness of rates charged to shippers amounted to state law regulation of a core aspect of federal rail transportation—rail rates and practices—that falls within ICCTA's express preemption clause. Accordingly, Petitioners' attempt to argue that the

D.C. Circuit applied a definition of "regulation of rail transportation" that is out of step with *Franks* and *City of West Palm Beach* is a red herring. Petition at 20, 22-23. Those courts suggested the "regulation of rail transportation" meant "managing or governing" rail transportation. *Franks*, 593 F.3d at 410; *City of West Palm Beach*, 266 F.3d at 1331. Far from adopting a definition of "regulation" that is different from these cases or other courts, the D.C. Circuit held that the state laws at issue here cut to the heart of that definition.[4] There is nothing in *Franks*, *City of West Palm Beach*, or any other case to suggest that regulation of a railroad's rates does not constitute "managing or governing" rail transportation.

Petitioners' avowed intention was to use state antitrust, consumer protection, and unjust enrichment claims to extend to unregulated contract traffic regulatory remedies that the STB had ordered for regulated freight traffic. App. 20a-21a. As the court of appeals properly held, it is impossible for Petitioners to claim that they do not seek to use state laws to "regulate" rail transportation, when they ***admit*** that they are trying to use damages to replicate the same kind of regulation that the STB has exercised for traffic within its regulatory authority. Rather, as the court of appeals concluded,

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[4] The district court below reviewed the ICCTA preemption case law and cited *City of West Palm Beach*, among others, for the proposition that ICCTA preempts "all state laws that may reasonably be said to have the effect of managing or governing rail transportation." App. 42a. The court of appeals below cited the same authority for the proposition that economic regulation lies at the core of ICCTA preemption. App. 16a-17a.

when state-law unjust enrichment, consumer protection, and antitrust claims are "advanced as a means of challenging the substantive ***reasonableness*** of the rates charged under private contracts," they necessarily constitute state-law regulation preempted by ICCTA. App. 21a (emphasis in original).

In sum, far from presenting a conflict with other circuits, the decision below is completely congruent with the decision of ***every*** circuit that has addressed the scope of ICCTA preemption.

II. THE COURT OF APPEALS PROPERLY HELD THAT THE PLAIN LANGUAGE OF SECTION 10501(b) PREEMPTS STATE-LAW REGULATION OF RAILROAD RATES

Petitioners devote much of their petition to a contrived argument that the court of appeals ignored the plain language of Section 10501(b) in favor of a "purposes and objectives" analysis based on legislative history that Petitioners claim is inconsistent with the language of the preemption provision. Petition at 15-23. That is not correct. The legislative history supports the court of appeal's interpretation of the statutory language. In any event, most of the court of appeals' review of legislative history was to explain that Petitioners' ***own*** reliance on legislative history concerning the interplay between Section 10501(b) and Section 10709 was incorrect. App. 9a-15a. The court of appeals rejected Petitioners' argument that Section 10709 exempts contract rates from Section 10501(b), concluding that this argument was defeated not only by the express language of Section 10709, but also by

the legislative history of both the Staggers Rail Act of 1980 and ICCTA. *Id.* Petitioners make no attempt here to defend their argument below under Section 10709. *See supra*, note 3. Instead, they rely on their "fallback argument" below (App. 15a)—that their state law claims do not involve "regulation of rail transportation" within the meaning of Section 10501(b).

In reaching its conclusion that Petitioners' claims were preempted, the court of appeals, like the district court, evaluated the text of the statute and what other courts interpreting Section 10501(b) had held constituted "regulation" within the statutory context. They found that those courts recognized that the core of ICCTA preemption is "economic regulation." App. 16a-18a. They noted that other kinds of regulation, such as environmental regulation, may also be preempted by Section 10501(b), but in the realm of economic regulation, non-contractual state-law claims are indisputably "completely preempted" on the face of the statute. *Id.* The court of appeals looked to legislative history only to confirm what is apparent on the face of Section 10501(b)—that state-law regulation of a railroad's "rates" and "practices" is exactly what ICCTA was intended to preempt. App. 18a-19a. The legislative history supports the court of appeal's understanding of the statutory language, and the circuit court's consideration of that legislative history was perfectly proper.

At bottom, Petitioners do not have a complaint about the D.C. Circuit's method of interpreting the statute, but instead seek acceptance of a view that has been repeatedly rejected by the courts—namely, that ICCTA displaces only a narrow set of state laws

that are specifically directed to rail carriers. Petition at 14, 20, 30, 36. It is Petitioners' analysis, however, that is in conflict with prevailing precedent. As detailed above, courts and the STB have repeatedly rejected the idea that laws of general application that do not specifically target railroads cannot be preempted by ICCTA. Indeed, the great majority of cases finding ICCTA preemption involves state laws of general applicability.[5] The application of certain general laws may survive when they are applied to the activities of non-railroads (as in *City of West Palm*

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[5] *See, e.g., City of Alexandria*, 608 F.3d at 154-55 (municipal land use and traffic laws); *Port City Properties v. Union Pacific R.R. Co.*, 518 F.3d 1186, 1187 (10th Cir. 2008) (tortious interference with business relations and defamation); *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 538 (5th Cir. 2005) (intentional interference with contractual relations); *City of Lincoln*, 414 F.3d at 858 (state condemnation law); *Green Mountain*, 404 F.3d at 639 (state environmental land use law); *Friberg*, 267 F.3d at 441 (common law negligence); *City of Auburn*, 154 F.3d at 1027-28 (state and local environmental land use laws); *Village of Ridgefield Park v. New York Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 67 (N.J. 2000) (municipal nuisance law); *Maynard v. CSX Transp., Inc.* 360 F. Supp. 2d 836, 841-42 (E.D. Ky. 2004) (common law nuisance claims); *Pejepscot*, 297 F. Supp. 2d at 333-34 (tortious interference and exemplary damages); *Rushing*, 194 F. Supp. 2d at 500 (state nuisance and negligence claims); *Guckenberg*, 178 F. Supp. 2d at 955 (common law nuisance claims); *City of Marshfield*, 160 F. Supp. 2d at 1011 (state condemnation law); *City of Minneapolis*, 38 F. Supp. 2d at 1097-98 (municipal historic preservation and demolition permitting laws); *North San Diego County Transit Dev. Bd.*, 2002 WL 1924265, at *2 (state environmental laws); *Friends of the Aquifer*, 2001 WL 928949, at *4 (state and local environmental laws); *Cities of Auburn and Kent*, 1997 WL 362017, at *5 (state environmental and local land use law).

Beach) or when they do not interfere with railroad operations (as in *Franks*), but the court of appeals properly held below that a railroad's rates to its shippers are central to its transportation function. App. 17a-18a. Contrary to Petitioners' suggestion, there is nothing "remote" or "incidental" about a state-law challenge to the "fairness" or "reasonableness" of rail transportation rates to shippers. It represents precisely the kind of balkanized state-law interference with rail transportation that Congress intended to preempt. App. 17a-21a.

Moreover, from the beginning, courts have held that when Congress mandated in Section 10501(b) that the "remedies" provided in ICCTA were "exclusive," it meant that those remedies were exclusive of any state law remedies that might be used to regulate rail transportation, regardless of whether a federal remedy was available to a particular plaintiff with a particular claim. *See Georgia Pub. Serv. Comm'n*, 944 F. Supp. at 1581.[6]

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[6] This broad reading of the statute has been repeatedly endorsed by the courts. *See, e.g., Franks*, 593 F.3d at 449; *Green Mountain*, 404 F.3d at 645; *Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 562-63 (6th Cir. 2002); *City of Auburn*, 154 F.3d at 1027-30; *City of Seattle v. Burlington N. R.R. Co.*, 41 P.3d 1169, 1171-72 (Wash. 2002); *Pejepscot*, 297 F. Supp. 2d at 332-33; *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001); *Guckenberg*, 178 F. Supp. 2d at 958-59; *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998); *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1295 (D. Mont. 1997); *North San Diego County Transit Dev. Bd.—Pet. for Dec. Order*, STB Fin. Dkt. No. 34111, 2002 WL 1924265, at *4-5 (Aug. 19, 2002); *Friends of the Aquifer—Pet. for Dec. Order*, STB Fin. Dkt. No. 33966, 2001 WL 928949, at

Finally, Petitioners imply that the court of appeals somehow erred in failing to focus on the definition of "transportation" in the statute, which references a wide range of rail facilities and services. Petition at 30; *see* 49 U.S.C. § 10102(9). It is difficult to ascertain Petitioners' point, but if they are implying that ICCTA preemption only applies to interference with physical train movements, such a suggestion would be belied by the plain language of the statute. Section 10501(b) specifies that the STB's jurisdiction over "transportation by rail carriers" ***and*** "the ***remedies provided in this part*** with respect to ***rates***, classifications, rules (including car service, interchange, and other operating rules), ***practices,*** routes, services, and facilities of such carriers . . . is ***exclusive***," ***and*** "the ***remedies provided under this part with respect to regulation of rail transportation*** are ***exclusive*** and preempt the remedies provided under Federal or State law" (emphasis added). Thus, Section 10501(b) expressly gives the STB exclusive jurisdiction over any "remedy" for a railroad's rates and practices, ***as well as*** more generally preempting any state-law remedy that would effectively regulate rail transportation. The courts have repeatedly endorsed this broad view of the statute. *See supra*, note 6, and accompanying text.[7]

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*3-4 (Aug. 10, 2001); *Cities of Auburn and Kent, WA—Pet. for Dec. Order—Burlington N. R.R. Co. Stampede Pass Line*, STB Fin. Dkt. No. 33200, 1997 WL 362017, at *7 (July 1, 1997).

[7] Further, as discussed above, the courts have specifically observed that rates and other economic regulatory matters are at the core of ICCTA preemption. *Franks*, 593 F.3d at 409; *Jackson*, 500 F.3d at 252; *Friberg*, 267 F.3d at 443; App. 16a-18a. If ICCTA preempted only state-law interference with

III. THE PRESUMPTION AGAINST PREEMPTION DOES NOT APPLY TO RAIL REGULATION, AND EVEN IF IT DID, IT WOULD HAVE NO BEARING ON THE OUTCOME OF THIS CASE

Petitioners also attempt to manufacture an issue worthy of review by arguing that the court of appeals erred in not addressing "the presumption against preemption" when evaluating the preemptive effect of Section 10501(b) in this case. The first answer to this complaint, as this Court has emphasized, is that there is no presumption against preemption when a state legislates in an area where there has been a significant federal presence. *United States v. Locke*, 529 U.S. 89, 108 (2000). The district court specifically recognized the federal government's historic regulation of the railroad system and held that it "counsels against [a presumption of non-preemption] in this case." App. 41a n.4 (citing *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (quoting *Locke*, 529 U.S. at 108, and also citing *City of West Palm Beach*, 266 F.3d at 1327-28)). *See also City of Alexandria*, 608 F.3d at 160 n.12; *Railroad Ventures, Inc.*, 299 F.3d at 562; *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000).

Contrary to Petitioners' suggestion, there is no tension between the district court's analysis and the

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physical train movements, then states would be free to apply common law remedies to "supplement" the STB's exclusive rate reasonableness jurisdiction over regulated or exempt freight traffic. Even Petitioners do not claim such state-law regulation is permitted by the statute. App. 2a n.1.

Eleventh Circuit's application of the presumption in *City of West Palm Beach*. As discussed above, the Eleventh Circuit was addressing the application of zoning laws to a party that was not a railroad using property leased from a railroad for "non-rail transportation purposes." 266 F.3d at 1330-31. In contrast, as the district court and the court of appeals both determined below, the regulation of railroad rates, which is the subject at issue here, is at the core of the federal government's historic responsibility. App. 17a-18a, 41a-42a.

Moreover, the application of a presumption against preemption would have had no impact on the outcome of this case. Where Congress's preemptive intent is clear from the statutory language, the presumption against preemption is irrelevant. *See, e.g., City of Auburn*, 154 F.3d at 1031 fn. 7 ("When a court finds the terms of a statute unambiguous, judicial inquiry is complete") (citing *Rubin v. United States*, 449 U.S. 424, 430 (1981). The language in the statute would still preempt the state laws at issue. Also, as discussed in Part I above, the circuit courts have uniformly held that state and local laws that have the effect of regulating rail transportation are preempted by ICCTA. This includes cases involving environmental, zoning, negligence, and other laws that traditionally have been the province of States and local governments.[8] Therefore, the application of the presumption against preemption in the area of railroad rates to shippers, where the federal government has long been dominant, would have no bearing on the result. The statute would still preempt the state laws at issue here on its face,

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8 *See supra*, note 5.

for as both the district court and court of appeals emphasized, Petitioners' state law claims challenging rail carrier rates implicate the core concern of ICCTA's express preemption clause. App. 47a (citing *Jackson*, 500 F.3d at 252); App. 17a (same).

In this regard, it is noteworthy that in the analogous areas of national air and truck transportation, the Court has repeatedly found that state laws that would interfere with the congressional scheme of regulation and deregulation of those industries were preempted—without any discussion of a presumption against preemption. *See American Airlines, Inc.*, 513 U.S. at 222; *Morales*, 504 U.S. at 378-79. This was so even though the state laws at issue were consumer fraud and consumer-protection laws of general applicability. *American Airlines, Inc.*, 513 U.S. at 227; *Morales*, 504 U.S. at 386.[9] *See also Rowe*, 552 U.S. at 370-74 (applying *American Airlines, Inc.* and *Morales* to preempt state-law regulation of motor carriers, and

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[9] Consistent with *American Airlines, Inc.* and *Morales*, the Airline Deregulation Act has also been found to preempt the application of state antitrust laws to airline pricing practices. *See In re Korean Air Lines Co. Antitrust Litig.*, 567 F. Supp. 2d 1213, 1220 (C.D. Cal. 2008) (finding that civil antitrust claims for damages constituted regulation of "the manner by which Defendants set fares, or components of fares, for air transportation services"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MD-06-1775, 2008 U.S. Dist. LEXIS 107882, at * 113 (E.D.N.Y. Sept. 26, 2008) (report and recommendation adopted by district court on Aug. 21, 2009) (preempting state law antitrust and consumer protection claims brought by indirect purchasers challenging the "manner in which the defendants set prices, or components of prices, for airfreight shipping services").

emphasizing that the application of a patchwork of state service-related laws to the national motor carrier industry would undermine Congress' preemptive mandate).

In none of these three decisions did the Court concern itself with the presumption against preemption. Given the clarity of the express preemption provision and the long-standing regulation of national air and motor transportation, the presumption against preemption was irrelevant to the outcome of those cases. In this case, citing *Morales* and the Airline Deregulation Act, the district court below correctly noted that "[w]ith similarly broad language, ICCTA preempts state laws with 'respect to regulation of rail transportation.'" App. 47a (quoting 49 U.S.C. § 10501(b)).

In sum, the presumption against preemption has no bearing on the outcome of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: November 9, 2010

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IN THE

Supreme Court of the United States

FAYUS ENTERPRISES, on behalf of itself and all others similarly situated, et al.,

Petitioners,

–v.–

BNSF RAILWAY COMPANY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Table of Contents i

Summary 1

A. This is not a Rate-Making Proceeding 1

B. Respondents Paper Over the Circuit Conflict 1

C. Respondents Do Not Analyze the Preemption Statute 2

Argument 3

A. The Petition Does Not Request Review of a Rate-Making Proceeding 3

B. The Court of Appeals' Expansive View of Regulation Conflicts with Other Circuits . 5

C. The Purposes and Objectives Preemption Found Here is Not Supported by the Statute 11

Conclusion 14

TABLE OF AUTHORITIES

PAGE

CASES

Adrian & Blissfield R. Co. v. City of Blissfield, 550 F.3d 533, 539-41 (6th Cir. 2008) 7

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 (1981) 13

City of Auburn v. United States, 154 F.3d 1025, 1030-31 (9th Cir. 1998) 9

City of Lincoln v. STB, 414 F.3d 858, 860-61 (8th Cir. 2005) 8

CSX Transp. v. Easterwood, 507 U.S. 658, 664 (1993) 9

Emerson v. Kansas City S. Ry., 503 F.3d 1126, 1131-32 (10th Cir. 2007) 7

Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001) 6, 8

Franks Invsmt. Co. v. Union Pac. R. Co., 593 F.3d 404, 410-11 (5th Cir. *en banc*, 2010) 12

Green Mtn. R. v. Vermont, 404 F.3d 638 (2d Cir. 2005) 9

Island Park, LLC v. CSX Transp. & Consol. Rail, 559 F. 3d 96, 104 (2d Cir. 2009) 9

Medtronic v. Lohr, 518 U.S. 470, 485 (1996) 10

Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 157-58 (4th Cir. 2010) 8

Northern Securities Co. v. United States, 193 U.S. 197, 407 10

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) 10

Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 13

Wyeth v. Levine, 129 S.Ct. 1187, 1196 n.3 10

STATUTES

49 U.S.C. § 10101 ..... 4, 13

49 U.S.C. § 10102(9) 5

49 U.S.C. § 10501(b) ..... passim

49 U.S.C. § 10501(d) 11

CONGRESSIONAL DOCUMENTS

Committee on Transportation and Infrastructure, House of Representatives, ICC Termination Act of 1995, H.R. Rep. 104-311 (Nov. 6, 1995) *reprinted in* 1995 U.S.C.C.A.N. 793 6

House-Senate Committee of Conference, ICC Termination Act of 1995, H.R. Rep. 104-422 at 167 (Dec. 18, 1995), *reprinted in* 1995 U.S.C.C.A.N. 850 7

Report of the Senate Commerce Committee, Interstate Commerce Commission Sunset Act of 1995, S. Rep. 104-176 at 57, Nov. 21, 1995, commenting on bill S.1096 § 304 (1995) 6

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY

Three points raised by Respondents in their Opposition to Petition for Certiorari warrant a Reply.

A. This is not a Rate-Making Proceeding

Respondents argue that Petitioners are objecting to the fairness of their shipping rates and practices, to bring the case within the traditional Interstate Commerce Act preemption. What the complaint challenges, however, are agreements in restraint of trade. The "remedies provided under Federal or State law" that are preempted under 49 U.S.C. § 10501(b)) (second sentence) are only remedies "with respect to regulation of rail transportation." *Id.* Laws barring agreements in restraint of trade, whether Federal or State, do not "regulate rail transportation."

B. Respondents Paper Over the Circuit Conflict

Respondents argue that the conflict described in the Petition is not genuine because all circuits agree that state laws regulating rail transportation are expressly preempted. Opposition at 12. The argument begs the question, which is: What constitutes regulation of rail transportation. As demonstrated in *Respondents'* cases, most circuits follow the test that the challenged law must purport to manage or govern. Applying its own purposes and

objectives analysis, the Court of Appeals here applied an economic impact test and found statutes of general application prohibiting agreements in restraint of trade to be regulation of rail transportation. This analysis both departs from the express preemption language and ignores the specific U.S. Government policy enacted with the statute. It is in direct conflict with a 2010 Fifth Circuit *en banc* decision, to which the Court of Appeals turned a blind eye.

C. Respondents Do Not Analyze the Preemption Statute

The operative preemptive language here, the Exclusive Remedies clause Congress added to the statute in 1995, was tacked on to a section dealing with the STB's exclusive jurisdiction. In the final bill Congress added an additional limiting phrase to this new preemption clause, expressly clarifying that preemption was only for "remedies with respect to regulation of rail transportation" (App. 62a, 49 U.S.C. § 10501(b), second sentence). Respondents argue that Congress's preemptive intent should be gleaned from legislative reports, but they rely principally on two reports written before this limiting phrase was added. Only one legislative report comments on this added sentence, and both Respondents and the Court of Appeals ignore the comment. In any event, the Court should take this opportunity to emphasize the primacy of statutory language in determining Congress's preemptive intent.

ARGUMENT

A. The Petition Does Not Request Review of a Rate-Making Proceeding

This is not a rate-making case. Respondents' mantra that this case involves "rates and practices," instead of a conspiracy and agreements in restraint of trade as alleged in the Complaint, enables them to cite repeatedly to the Exclusive Jurisdiction clause, which provides the Surface Transportation Board with exclusive jurisdiction over rates and services. App. 64a, 49 U.S.C. § 10501(b)(1). Having established a straw man pleading, Respondents then confuse the cases cited under the Exclusive Jurisdiction clause with cases decided under the Exclusive Remedies clause – the only place where the word "preemption" appears.

On this appeal from a motion to dismiss the starting point is the Complaint. It alleges that Respondents (i) "entered into and effectuated a contract, combination or conspiracy in unreasonable restraint of trade" in violation of the Sherman Act (App. 128a-129a, Cplt. Count I), (ii) "entered into agreements in restraint of trade in violation of" various state antitrust laws (App. 129a-32a, Cplt. ¶¶ 122-42), and (iii) by these conspiracies and agreements in restraint of trade engaged in "unfair competition or unfair, unconscionable, deceptive or fraudulent acts or practices" in violation of state consumer protection and unfair competition statutes and unjust enrichment laws (App. 132a-36a, Cplt. Counts III & IV).

Respondents also acted collectively to manipulate a trade organization that they dominated (App. 101a, Cplt. ¶ 72), and acted in collusion and met regularly to agree upon and coordinate implementation of surcharges that they agreed to add on to rail freight shipping rates (App. 75a-77a, 97a-98a, Cplt. ¶¶ 10-17 & 64-65). Respondents moved in lockstep in furtherance of their price-fixing conspiracy (App. 71a-72a, 98a, Cplt. ¶¶ 2, 65). Respondents' conspiracy in restraint of trade enabled them to impose on plaintiffs what was represented as a fuel surcharge, but in fact was a percentage increase based "on the entire cost of rail freight transport," which was "far beyond any actual increases in fuel costs" (App. 101a-02a & 105a, Cplt. ¶¶ 73 & 81). Respondents engaged in concerted action through anticompetitive agreements to increase profits and to avoid undercutting each other. (App. 103a-106a, Cplt. ¶¶ 77-81.)

In their Opposition to the Petition, Respondents contend that what they achieved by these unlawful agreements in restraint of trade are protected "rates and practices," and repeatedly characterize Petitioners' complaint as challenging these "rates and practices." *E.g.*, Opposition at 3, 5, 10, 11, 12, 15 & 18. Respondents' unlawful contracts and agreements in restraint of trade were in violation of Federal and State law (App. 128a-36a, Counts I-IV), and were contrary to the explicit pro-competition statutory policy enacted by the ICC Termination Act (App. 62a, 49 U.S.C. § 10101 (1) & (4)).

B. The Court of Appeals' Expansive View of Regulation Conflicts with Other Circuits

Respondents state with conviction: "*All* of the circuit courts that have addressed the issue agree that if a state law has the effect of regulating rail transportation, it is expressly preempted by Section 10501(b)." Opposition at 12 (original emphasis). As the cases string-cited afterwards indicate, in the context of this case the statement is both true and meaningless.

"Transportation" is a term defined at 49 U.S.C. § 10102(9) to cover equipment and facilities "related to the movement of passengers and property" and "services related to that movement." (Respondents purport to find the definition in the Exclusive Jurisdiction clause, 49 U.S.C. § 10501(b) (first sentence), but the term "transportation" is used there, not defined there. Opposition at 21.) "Regulation" is not defined in the statute, but the cases (including those cited by Respondents) equate the term with "managing or governing" transportation by rail. The question is whether laws prohibiting agreements in restraint of trade regulate rail transportation, even though such laws have no effect on managing or governing railroads.

Where the Court of Appeals differs from other circuits is in deciding that regulation essentially means economic impact. Opposition at 10; App. 16a-18a (Opinion below). The Court of Appeals said yes. The Third Circuit, following the statutory language instead of legislative reports, has taken a directly opposite approach:

> Contrary to New Jersey and the *amici's* argument, the Termination Act does not preempt only explicit economic regulation. Rather, it preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation . . . . What matters is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as "economic" or "environmental."

New York Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252, citing *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

Respondents and the Court of Appeals base their approach on two legislative reports containing oblique references to economic regulation. Opposition 6-7. The Senate Report quoted, however, did not address the Exclusive Remedies clause at all,[1] and the House Report addressed the Exclusive Remedies clause before the limiting phrase "with respect to regulation of rail transportation" was added to it.[2] See Petition at 18-20. The only guidance in the legislative reports on the meaning of this limiting phrase is in the Conference Committee Report. The Report states that the sentence was added to "clarify[] that the exclusivity is limited to remedies with

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[1] Report of the Senate Commerce Committee, Interstate Commerce Commission Sunset Act of 1995, S. Rep. 104-176 at 57, Nov. 21, 1995, commenting on bill S.1096 § 304 (1995).

[2] Committee on Transportation and Infrastructure, House of Representatives, ICC Termination Act of 1995, H.R. Rep. 104-311 (Nov 6, 1995) *reprinted in* 1995 U.S.C.C.A.N. 793.

respect to rail regulation – not State and Federal law generally."[3]

Other circuits have concluded that regulation of rail transportation is more strictly related to managing or governing rail operations. The nine cases string-cited by Respondents illustrate. Four of them found no preemption because there was no managing or governing rail operations:

- *Franks Invsmt. Co. v. Union Pac. R. Co.*, 593 F.3d 404, 410-11 (5th Cir. *en banc*, 2010) ("only laws that have the effect of managing or governing rail transportation will be expressly preempted" – challenge to closing of private crossing only incidentally affects, and does not have "the effect of managing or governing," rail transportation);
- *Adrian & Blissfield R. Co. v. City of Blissfield*, 550 F.3d 533, 539-41 (6th Cir. 2008) (state law permitting municipality to construct a sidewalk at a railroad crossing (when railroad refused to do so) and bill the railroad for the cost not preempted; state regulation that is "not unreasonably burdensome" and "does not discriminate against railroads" is not preempted);
- *Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1131-32 (10th Cir. 2007) (local regulation of improper dumping of railroad ties not

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[3] House-Senate Committee of Conference, ICC Termination Act of 1995, H.R. Rep. 104-422 at 167 (Dec. 18, 1995), *reprinted in* 1995 U.S.C.C.A.N. 850. ("Conf. Comm. Rpt.")

preempted – railroad's logic rejected as it would permit railroad to "dispose of a dilapidated engine in the middle of Main Street").

- *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (the landmark case – regulation of property leased by railroad is not managing or governing railroad operations).

Of the five cases that did find preemption, four dealt with transloading facilities or a right of way needed for loading and unloading freight, and the fifth found preempted a challenge to an STB-approved reconstruction of a rail line.

- *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010) (preemption provision narrowly tailored to displace only "regulation," *i.e.*, those state laws that may reasonably be said to have the effect of managing or governing rail transportation – local regulation of movement and transloading of freight preempted).
- *New York Susquehanna*, 500 F.3d at 252 (preemption reaches local rules that would manage or govern railroad operations; regulation of transloading facility preempted).
- *City of Lincoln v. STB*, 414 F.3d 858, *860*-61 (8th Cir. 2005) (condemnation of a 20-foot strip from railroad right of way preempted because it would interfere with loading, unloading and storage of freight and access for maintenance and derailment response).

- *Green Mtn. R. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (local regulation of transloading facility preempted.)
- *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (local regulation of a railroad's STB-approved effort to revive a rail line was preempted under Exclusive Jurisdiction clause).

As is readily apparent from the authorities Respondents cited, the Court of Appeals is the only court to have found that laws prohibiting agreements in restraint of trade have the effect of managing or governing railroad operations. In fact, one of Respondents, in seeking a finding of *non*-preemption, won a decision from the Second Circuit holding that

> the ICCTA's pre-emption language . . . does not categorically sweep up all state regulation that touches upon railroads – interference with rail transportation must always be demonstrated.

Island Park, LLC v. CSX Transp. & Consol. Rail, 559 F. 3d 96, 104 (2d Cir. 2009) (state transportation department closure of railroad crossing, sought by Respondent CSX, held not preempted). Respondents have simply made no credible argument that laws prohibiting agreements in restraint of trade interfere with rail transportation.

The task of determining the scope of preemption "must in the first instance focus on the plain wording of the clause . . . ." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993). Respondents' and the Court of Appeals' confused reading of the statute, reflecting a

misapplied "purposes and objectives" jurisprudence, essentially concludes that preemption "somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail." *See Northern Securities Co. v. United States*, 193 U.S. 197, 407 (Holmes, J. dissenting).

Furthermore, Respondents' contention that no presumption against preemption lies when a state legislates in an area where there has been significant federal presence is misplaced. Opposition at 22. Rather, the presumption analysis starts with the "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Moreover, "respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.' The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Wyeth v. Levine*, 129 S.Ct. 1187, 1196 n.3 (quoting *Medtronic*, 518 U.S. at 485 (2009)).

The Court of Appeals casually disregarded the ICCTA's preemption language and presupposed that laws prohibiting agreements in restraint of trade fit neatly into the meaning of "regulation of rail transportation." App. 16-17a. This is incorrect. Rather, laws that prohibit agreements in restraint of trade are laws of general application not directed only at railroads. Because these laws have no regulatory effect on rail transportation, they do not encroach on

any federal stronghold or defeat Congress's purpose of regulating rail transportation. Thus, the presumption against preemption should have been applied to account for the historic presence of state laws prohibiting price-fixing agreements that do no supersede any federal mandate.

Certiorari is warranted here to emphasize for lower courts the importance of adhering to the statutory language in construing the scope of an express preemption clause.

C. The Purposes and Objectives Preemption Found Here is Not Supported by the Statute

The issue presented by this Petition is not whether Congress is entrusted by the Constitution with the power to preempt the state laws at issue here, but whether Congress has exercised that power.

The starting point is the statute, quoted in full at App. 64a and not repeated here. It consists of two sentences. The first defines as exclusive the jurisdiction of the Surface Transportation Board (the "STB") over three limited areas: (i) transportation by rail carriers, (ii) the remedies provided by the statute with respect to rates, rules and practices of rail carriers, and (iii) track construction and abandonment (the "Exclusive Jurisdiction clause"). This section was found at 49 U.S.C. § 10501(d) prior to 1995, applying then to the ICC. The second sentence (the "Exclusive Remedies clause") defines "the remedies provided under this part with respect to regulation of rail transportation" as exclusive and states that they

"preempt the remedies provided under Federal and State law." 49 U.S.C. § 10501(b) (second sentence). This clause, which contains the only reference to preemption, was added to the Exclusive Jurisdiction clause in 1995 – the evolution is described on pp. 17-21 of the Petition. In the last draft of the bill that became the ICC Termination Act, Congress added the limiting phrase "with respect to regulation of rail transportation," which the Conference Report explained was to "clarify[] that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." Conf. Comm. Rpt. at 167; see nn. 1-3 above and accompanying text.[4]

In an effort to obfuscate these two distinct provisions, Respondents quote the statute interspersed with several ellipses and omit (without ellipsis) the word "otherwise" from the Exclusive Remedies clause. However, even the Court of Appeals accepted Petitioners' jurisdiction and remedies characterization of the two sentences and addressed them separately (*e.g.*, App. 5a & 15a), as did the Fifth Circuit *en banc* in *Franks Invsmt. Co. v. Union Pac. R.*, 593 F.3d 404, 406-07 (5th Cir. 2010).

Respondents' obfuscation of the statute engenders a casual approach to statutory construction. To the extent that "preemption" existed before enactment of the ICC Termination Act in 1995, it was a

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[4] Respondents quoted the immediately preceding sentence (Opposition at 5-6, n. 1), and the Court of Appeals quoted the immediately following sentence (App. 18a), but both were silent on this sentence "clarifying" the scope of preemption.

function of the ICC's exclusive jurisdiction over the three areas delimited above, which was continued by the Termination Act for the STB. This is the clause that would prohibit states from conducting rate-making proceedings, the concept addressed in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and its progeny (Opposition at 2). As the Court recognized in *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981) (Opposition at 2), it is statutory recognition of Congress's Commerce Clause power, which likely explains why the clause does not speak of preemption, a Supremacy Clause concept.

When the Exclusive Remedies clause added the term "preemption" to the statute in 1995, it was only to preempt remedies provided under Federal and State law with respect to "regulation of rail transportation." Petition at 20. That laws prohibiting agreements in restraint of trade fall outside the preempted regulatory remedies is illustrated by the policy of the U.S. Government enacted by the Termination Act. App. 62a, 49 U.S.C. § 10101 (1) & (4). Neither the Court of Appeals nor Respondents have established a statutory basis for preemption of such collusive and anti-competitive agreements, or a reason to read the statute in a way that conflicts with the statutory declaration of policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

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